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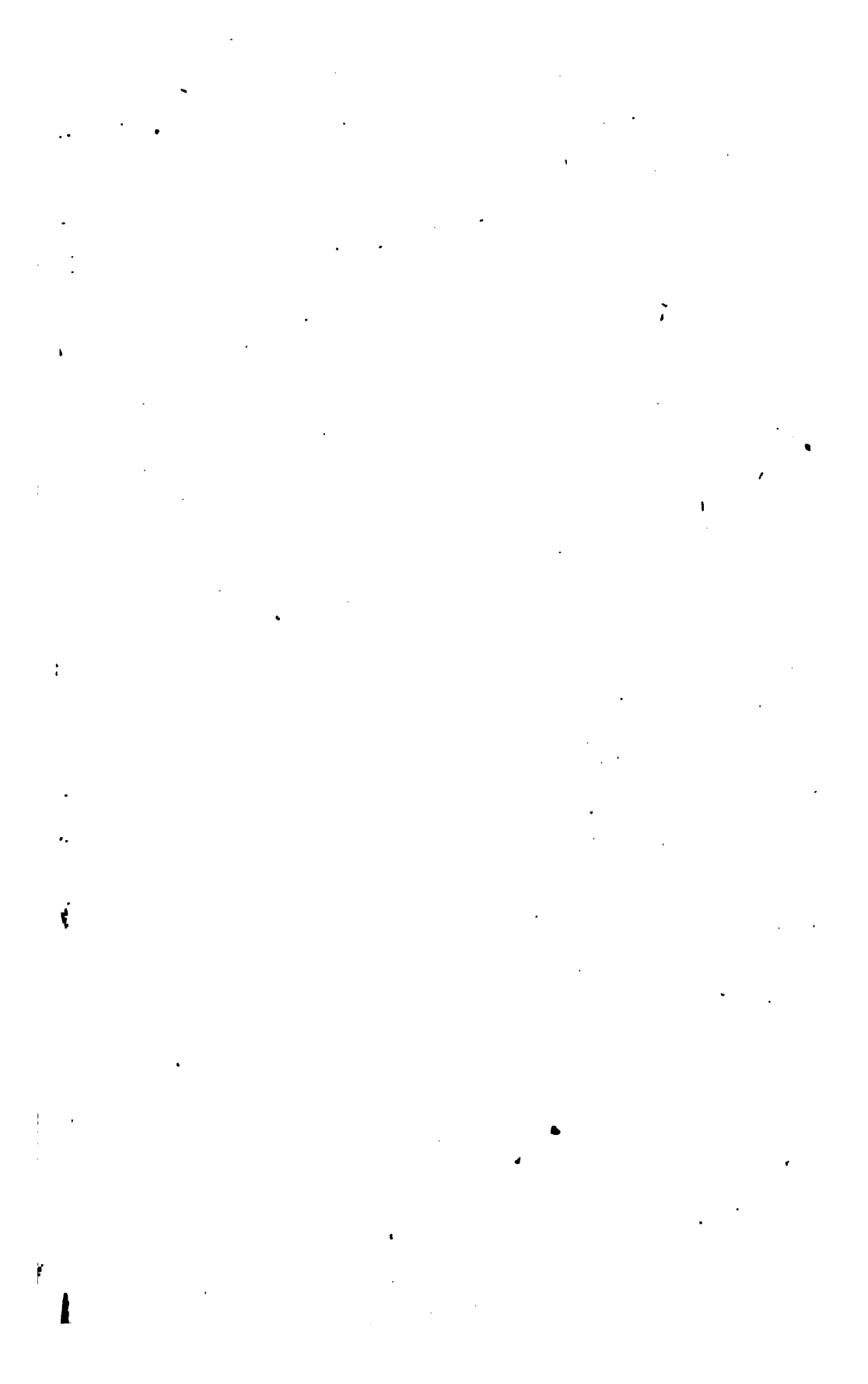
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REPORTS OF CASES AT LAW,

ARGUED AND DETERMINED *8*

IN THE

COURT OF APPEALS

AND

COURT OF ERRORS,

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VOLUME VIII.

FROM NOVEMBER, 1854; TO MAY, 1855; BOTH INCLUSIVE.

BY J. S. G. RICHARDSON,

STATE REPORTER.

CHARLESTON, S. C.

M^c CARTER & C^o.

1855.

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Rec. Oct. 17, 1855

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Judges of the Court of Sessions and Common Pleas, and of the Law Court of Appeals:

HON. JOHN B. O'NEALL,	HON. JOSEPH N. WHITNER,
" DAVID L. WARDLAW,	" THOMAS W. GLOVER,
" THOMAS J. WITHERS,	" ROBERT MUNRO.

Chancellors and Judges of the Court of Appeals in Equity:

HON. JOB JOHNSTON,	HON. GEORGE W. DARGAN.
" BENJ. F. DUNKIN,	" F. H. WARDLAW.

Recorder of the City of Charleston:

HON. WILLIAM RICE.

Attorney General:

I. W. HAYNE, Esq.

Solicitors:

<i>Eastern Circuit,</i>	H. McIVER, Esq.
<i>Western</i>	" J. P. REED, Esq.
<i>Middle</i>	" SIMEON FAIR, Esq.
<i>Northern</i>	" T. N. DAWKINS, Esq.
<i>Southern</i>	" M. L. BONHAM, Esq.

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TRIBUTE TO THE MEMORY OF EX-GOVERNOR JOHNSON.

A meeting of the Bar was held in the chamber of the Equity Court of Appeals, January 15, 1855, at half-past nine o'clock, A. M., to pay a tribute of respect and regard to the memory of the late Ex-Governor JOHNSON.

On motion of J. L. PETIGRU, Esq., ISAAC W. HAYNE, Esq., Attorney General, was called to the Chair, and THOS. J. GANTT, Esq., (Clerk of the Courts of Appeal and the Court of Errors, on the nomination of the deceased,) was appointed Secretary.

The Chairman stated the object of the meeting in a few appropriate remarks.

The Hon. MITCHELL KING then rose, and introduced the following preamble and resolutions :

The State of South Carolina is again called to mourn the death of one of her most distinguished citizens. On the 7th day of this month, at his residence at Limestone Springs, the venerable and venerated David Johnson paid the debt of nature, and his ashes repose in Union District, near the place where he first saw the light. The sympathies and affection of the community gather around his tomb. Every man feels that he has lost an enlightened friend. But the Judiciary, of whom he was long the presiding officer—who were so long associated with him in their high duties, and who were bound to him by the strongest ties of mutual kindness and confidence—and the Bar, who sustained before him the toils of their laborious and anxious profession, have the deepest cause of sorrow.

We shall leave to the Biographer, the duty of commemorating the domestic and private virtues of our departed friend; and well, in them, will he deserve a faithful chronicler, for no kinder or more generous man, according to the full measure of his ability, ever lived. In every relation of life, he strove to perform his duty. His heart overflowed with the best feelings, and was governed and guarded by his enlightened intellect. To speak of him as a Lawyer and a Judge is the special privilege of the Bar; and if the voice of friendship mingle in our commemoration, it is because we cannot well separate our love of him as a friend, from our admiration of him as a Jurist.

David Johnson was indeed one of nature's noblemen. He was no less remarkable for his presence than for his virtues. His frame was large, well proportioned and athletic; his countenance grave, thoughtful and benevolent; his whole bearing and deportment conciliated esteem and commanded respect; his form was a fitting abode for his masculine and powerful intellect.

He studied law under the direction of the learned and upright Abraham Nott. After some years' successful practice at the Bar, he was, in 1815, raised to the Bench, and from that time, until in 1846, the spontaneous voice of the people, expressed by the votes of every member of both branches of our Legislature, called him to the Gubernatorial chair, he continued as a Judge at Law, a Judge of the Court of Appeals, or as Chancellor in Equity, to perform his judicial functions in the highest tribunals of the State. To the execution of these functions, he brought a mind well stored with legal lore—unwearied industry—invincible patience and perseverance—great natural abilities, and stainless integrity; no man was freer from prejudice—none firmer in his opinions, or maintained them with more urbanity and consideration for the opinions of others. Truth was his object, and he never, against his convictions, or to show his intellectual strength, contended merely for victory. The most inexperienced member of the Bar, in addressing him, was sure of an encouraging hearing, and a fair, impartial consideration of his arguments, while he enforced the rules and maintained the decorum and dignity of the Court. His manner was so mild, and his firmness so gentle, that the most sensitive feelings were not wounded—the most irritable could not take offence. The examination of witnesses before him was always conducted with a due regard to the cause of truth and justice. The modest, the diffident, and the candid, were protected—the reluctant, or equivocating, subjected to the full rigor of a searching scrutiny. Nothing could exceed the impartiality with which, as a Judge at Law, he laid the evidence in a cause before a jury, or the candor with which, as a Chancellor, he determined on it for himself. In all ordinary business of the Court, he was prompt and decisive. In cases of complexity or difficulty, he was patient and slow in coming to his conclusions, but when they were once formed he adhered to them with great firmness. This, however, was the firmness of a clear and self-relying mind, devoted to the right; and in any matter that he had adjudicated, brought again on appeal before him, no Judge ever lent a more willing ear to the arguments urged against his own opinion, and if, on full reconsideration, he was satisfied he had been in error, no man was ever more magnanimous in acknowledging that error, and in giving his rea-

sons for changing his opinion, and agreeing to the reversal of his previous judgment. He was seldom wrong, but he claimed no patent of infallibility, and was not only willing, but glad, to correct a mistake. When, after tasking all the energies of his mind, he remained satisfied that he was right, no power on earth could have induced him to let go his integrity. He was tried, well tried, in times of the deepest excitement, when many of his nearest and dearest friends, who held opinions different from his own, and with whom he might have been happy to agree, pressed their views earnestly and zealously upon him; he had formed his opinion on the clearest dictates of his own conscience, and to these dictates he unostentatiously and inflexibly adhered. He knew that, before his country, when excitement had passed away, and finally before his God, he must be tried on the truth and purity of his own correctness, and he has reaped his reward. The respect of the good and the wise clustered around him. His country spontaneously crowned him with her highest honors; and when advancing age caused him to withdraw from public life, followed him to his retreat with her cordial well-done and best wishes.

He has been taken from us, and has gone to receive the recompense of all his labors. We shall no more, in this world, see that manly form, or listen to the accents of that paternal voice. But though dead, he still speaketh in his high example—in his recorded judgments—in his wisdom, embalmed in the records of our courts. As lawyers or as judges, let us strive to imitate him in all his noble qualities—let us strive to guard from every profane touch the hallowed flame that burns on the altar of justice, and to transmit the sacred principles to which he devoted himself, unimpaired to our latest posterity.

Resolved, That the Bar of South Carolina attendant on the Court of Errors, and on the Courts of Appeal, now in session, deeply deplore the death of the Honorable DAVID JOHNSON. While he remained with us he was an honor and an ornament to the profession—we looked to him and to the dignities which he had achieved and worn so nobly, as the just reward of indefatigable industry, high talents and unsullied integrity—we pointed to him as an encouragement to the studious advocate, and as a model of judicial excellence. We admired and loved him while he lived; we mourn for him now he is dead; we will cherish and revere his memory.

2. That we very respectfully tender our sincere condolence to the bereaved members of his family, and beg leave to assure them of our unfeigned sympathy.

8. That these proceedings be presented to the Judges in the Court of Errors, with the request that the same be entered on their records.

The preamble and the resolutions were seconded by JAMES L. PETTIGRU, Esq., with the remark, that although the eulogy they embodied was high, the consciences of all present would testify that it was well deserved.

The preamble and resolutions were then unanimously adopted.

At the opening of the Court of Errors, composed of all the Law and Equity Judges, at 10 o'clock, A. M., the Attorney General, in conformity with the third resolution, after a few touching remarks, presented the preamble and resolutions to the Court.

On receiving the preamble and resolutions, the Hon. JOHN B. O'NEALL, President of the Court of Errors, as the organ of the Court, responded as follows :

Gentlemen :—The intelligence of the death of the great and good man, of whom you have just spoken, has been to me, as well as the other members of the Court, no ordinary cause of grief. From me, as his friend and associate of many years, it may well be expected that I should testify of his great, his exoelling worth. Before I do so, may I be permitted to say, that to me personally DAVID JOHNSON was more than a friend ; had it not been for the difference of many years in our ages and services, I should have called him brother, with even more than a brother's love. I am sure I felt for him all that love, respect and reverence that I did for my own father. When I presented myself in May, 1814, to the Constitutional Court for examination, as a student of law, he was the Solicitor appointed on the course of examination. From that time our friendship has been continued and unbroken. It is, therefore, with almost filial feelings I stand up to answer you, and to say of him, that full of years and glory, he has " finished his course." In his 72d year, or having completed it by a few months " like the ripe grain," he has been gathered into the garner of his Master.

His life, *as we all know*, was one eminent for usefulness. He was a native of Spartanburg District, and in it, lie the remains of his father, Christopher Johnson, a Baptist preacher. His education was as good as an academy then furnished, but he mainly made himself the plain, but forcible writer, for which he was so remarkable. Looking at his portly person, his capacious head, his beautiful handwriting, and his clear and forcible written opinions, I have often said to myself, how much, in many respects, he is like George Washington.

He studied law with Judge Nott, then a lawyer living in Union District,

for four years, the period of study then prescribed for a law student not a graduate of a college; he read and re-read the scanty legal libraries then in possession of even the most eminent. He has told me that a portion of his preparation was the reading carefully of the whole of Bacon's Abridgment.

He was admitted to the bar in, I presume, 1805 or 1806. He was for several years the Ordinary of Union District, and resigned it to qualify himself to receive a fee of \$100 to settle, as the lawyer of the administrator, the estate of John McCall, deceased.

He was returned to the Legislature in 1812; and in the same session elected Solicitor of the Middle Circuit, in the place of David R. Evans, Esq., who had long filled the office, and who then resigned.

He was then little known—his practice was not extensive. The case of Tucker and Stevens, 4 Eq. Rep., 582, he has told me was the only bill in Equity which he ever filed.

In December, 1816, at the age of 38, he and Richard Gantt were elected Judges of the Law Court over the late Benj. C. Yancy, and Robert Starke, Esqs.

By labor, continuous and untiring, he made himself one of the most accomplished Circuit Judges before whom I ever practiced. His opinions in the Constitutional Court were prepared with wonderful care, often written over three times—they thus became models of judicial arguments.

He was one of the majority who declared at this place the Act of December 1816, requiring the Judges to clear the dockets, unconstitutional, because it was passed with the amendment of the Constitution. No decision ever created such an excitement. An extra session of the Legislature in April, 1817, was convened to remedy the matter, and another law was passed to the same effect by it. Judge JOHNSON's mild and temperate opinion saved him from a loss of popularity. His eminent friend and legal instructor, Judge Nott, received the largest measure of the displeasure of the Legislature. For, in the succeeding December, when the Judges resigned to be re-elected under the increased salary, Judge Nott was elected by a very slim majority, while his younger associate and former pupil was almost unanimously chosen.

In 1824, he, with Judges Nott and Colcock, was placed on the Appeal Bench, and performed its Herculean labors until that Court was abolished in 1835. Having, with the late Judge Harper, gone upon that Bench, in the places of Judges Nott and Colcock, in 1830, I may be permitted to say, as the only survivor, that the terms of '30, '31, '32, '33, '34 and '35, demanded

and received labor, attention and care far beyond anything which I have since experienced. In them, Judge Johnson performed a full part of the work, and as President of the Court was, as everywhere, fully equal to his duty. In December, 1835, he was placed, as I well know much against his wish, on the Equity or Chancery Bench. He distrusted himself from his early want of training for that department of judicial labor,—yet he performed the duties of a Chancellor admirably well. No Chancellor, with whom I have been acquainted, better sustained himself, or more dignified and adorned his office.

In 1846 he was elected and assumed the duties of Governor and Commander-in-chief of the State; he desired this office as the crowning reward of his labors! It was unanimously conferred upon him. Its many worrying duties he calmly and patiently performed. He was emphatically a civil magistrate; he had no military tact; yet he organized the brave Palmetto Regiment, with almost paternal care—he accompanied them to the border of the State, and standing on the Augusta bridge, with streaming eyes, bade them farewell! He welcomed Shields and Quitman as the leaders in battle of the sons of Carolina, on their journey through this State, and made them feel that South Carolina and her Chief Magistrate were worthy of their homage. He saw return the wasted, but gallant remnant of those with whom he had parted as the hope of the State, and gave them a father's welcome.

Since 1848 he has been in retirement, and has suffered more from disease and accidents, than has fallen to the lot of most men. All these he bore with that noble, uncomplaining patient fortitude, for which he was always so remarkable. But successive attacks of disease and injuries bowed his giant frame and subdued his iron will, and on Sunday, the 7th of January, he quietly and in the full hope of peace, everlasting peace, passed from earth. His remains on Monday, the 8th of January, were, in the graveyard at Unionville, placed by the side of his wife, in the presence of his numerous and devoted friends and children, and earth received and covered all that was mortal of DAVID JOHNSON.

Gone, forever gone from us, of earth, is the pure patriot, the just judge, the loved friend, and the man *who had not an enemy!* Take him all in all, we may well say of him, South Carolina will vainly seek his equal. He is the last of the judges of law and equity who were on the bench when I came upon it in 1828. All, all, are in the presence of the King of kings. His mind was eminently judicial. His charges to the jurors were plain, clear and short. He went upon the bench with the notion, that the jury

was to decide all questions of fact; but he soon learned that he must share with them the responsibility, and he never afterwards hesitated to place his opinion, both of the law and also of the facts, plainly before them.

His opinions, in the Constitutional Court, the Court of Appeals, and the Court of Appeals in Equity, will speak for themselves, and whoever reads them carefully will say that they will compare most favorably with those of the most eminent Judges of our great and growing country.

He was slow and even reluctant to begin a course of laborious reasoning, but when aroused he overthrew all opposing obstacles, and most clearly reached his conclusions.

He had no pride of opinion, no passion to gratify, no prejudice to turn him aside—truth and justice were alike his objects. He freely surrendered his opinions whenever error was presented to his mind. If he had a fault it was that he yielded his opinions too readily.

His very nature was kindness and benevolence; he never wilfully injured a human being. As a friend, he was sincere and unchanging. As a husband and a father, no human being was more attached and devoted. As a master, no man was more kind and just. His letter to me, after the accidental burning, in a house, of twenty of his negro children, was a most touchingly eloquent expression of a master's grief for the poor little ones, thus destroyed.

As citizen, officer and neighbor, he fulfilled every duty and met every expectation. Wherever he lived, wherever he was known or seen, he was loved. In his grave he will be remembered, and you brethren, as you run your eyes over his recorded labors, will drop many a tear upon the pages, and rise from them to reverence and perpetuate, *in your hearts*, the memory of the great and good DAVID JOHNSON.

Your motion is granted; the Clerk will spread your preamble and resolutions on the records of the Court of Errors and furnish copies to the children of the deceased, and also for publication, and for the State Reporter.

The Court will adjourn till to-morrow at 10 o'clock, so that in silent sadness, we may reflect upon the death of our friend and brother.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA,

Columbia—November and December Term, 1854.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL,	HON. JOSEPH N. WHITNER,
" DAVID L. WARDLAW,	" THOMAS W. GLOVER,
" THOMAS J. WITHERS,	" ROBERT MUNRO.

J. C. WILSON & Co. ET AL. vs. J. R. BOWDEN.

**An assignment by one partner of his interest to his separate creditor is valid,
at law, against the creditors of the firm subsequently attaching.**

**BEFORE O'NEALL, J., AT SPARTANBURG, AUGUST,
EXTRA TERM, 1854.**

THE PLAINTIFFS were creditors of the firm of Morgan & Cothran, merchants, doing business on Thickety creek, in Spartanburg district. J. B. Morgan, one of the partners, was, individually, indebted to insolvency. He was indebted to the defendant, Bowden, in the sum of five hundred and fifteen dollars, exclusive of interest; and the defendant was one of

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his sureties on a note for eight hundred dollars. On Saturday, January 22, 1853, at Spartanburg Court House, Morgan, in the presence of a witness, said to Bowden, in substance, as follows: "Go to Thickety, and take into your possession my half of the goods in the store of Morgan & Cothran, for your indemnity as my surety." On the same day Bowden went to Thickety, got possession of the goods in the store, carried them to North Carolina, there bought out Cothran's interest, and sold the goods for one thousand three hundred and forty-two dollars, Morgan's share being one-half, six hundred and seventy-two dollars.

The plaintiffs afterwards issued their writs of attachment, and the defendant was summoned as garnishee. He made a return, setting out the proceeds of the goods sold in North Carolina, and other effects in his hands. Morgan's interest in the whole amounted to one thousand and fourteen dollars, inclusive of a note on the garnishee. This sum Bowden claimed as creditor in possession, and also as assignee.

His Honor held, that one partner could assign his share of the partnership goods, and the assignment would be valid against partnership creditors. He submitted it to the jury to decide, whether the assignment and possession were obtained, *bona fide*. The jury found for the garnishee. The plaintiffs appealed, and now moved this Court for a new trial on the ground, *inter alia*, that his Honor erred in holding, that the assignment by Morgan of his interest in the co-partnership effects, to satisfy the claim of his separate creditor, was valid against the claims of the creditors of Morgan & Cothran.

Thompson, for the motion.

Bobo, contra.

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The opinion of the Court was delivered by

O'NEALL, J. The Court is not disposed to review the facts in this case. The jury, with better means of judging correctly than we possess, have decided, that there was no fraud in any respect as charged in the suggestion. We are content to abide by their conclusion.

It is only thought necessary to make a few remarks explanatory of the rights of co-partnership creditors.

There is no doubt in bankruptcy, or in the case of the death of one of the partners, or where it is a contest among execution creditors, the rule both at law and in equity is the same. In *Bowden vs. Schatzell*, Bail. Eq. 360, it is said by Judge Harper, that the property of a partnership is liable to the debts of the partnership before any part can be applied to individual debts. In *White, assignee, vs. The Union Insurance Company*, 1 N. & McC. 557, the rule was recognized, at law, that co-partnership effects ought to go to the payment of co-partnership debts, in the first place, then to the payment of the private debts of each co-partner afterwards, in proportion to his share in the joint funds.

This I understand to be the rule among execution creditors of the partnership, and of the individual partners.

In bankruptcy, it has been held in *Young vs. Keighly*, 15 Ves. 557, that an assignment by one partner of the joint property to secure his separate debt, must be subject to the joint debts. Here we have no similar means of reaching the same result. But even in England, and in bankruptcy too, in *Ex parte Rowlandson*, 2 Ves. & Beam. 172, and in *Ex parte Ruffin*, 6 Ves. 119, it has been held, that there is no lien on co-partnership effects for creditors until execution. From this it would seem, that the plaintiffs here cannot, at law, assail the assignment to the defendant of the co-partnership effects by the absent debtor, Morgan, for the indemnity of the defendant against the debt to Lipscomb, until they have recovered their judgments, and sued out their executions. Even then, I

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do not pretend to say what may be the result. For, if the share of a partner may be attached, as was decided in *Schatzell vs. Bolton*, 2 McC. 478, and may be ordered to be paid over to the attaching creditor, on his giving security to abide the claims of partnership creditors, as was decided in 3 McC. 33, I do not perceive why the assignee in possession should be disturbed, until it appears that he should, for some superior equity, be made subordinate to the partnership debts.

Now, at least, there is no reason why *at law*, having the legal right to the possession under the assignment by Morgan, he should be disturbed by mere alleged co-partnership debts: and which may, for aught we can know, until there is an account, be fully paid without reaching the fund now in dispute.

The motion is dismissed.

WARDLAW, WITHERS and GLOVER, JJ., concurred.

MUNRO, J., absent from indisposition.

Motion dismissed.

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NORRIS & BROTHER *vs.* T. O. P. VERNON & R. C. POOLE.

An assignment by one partner of his interest in the books of the firm is valid,
at law, against the creditors of the firm.

BEFORE O'NEALL, J., AT SPARTANBURG, AUGUST,
EXTRA TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

"The plaintiffs were creditors of Morgan & Cothran. They sued out a writ of attachment against J. B. Morgan, or against the firm, and the defendants, as in possession of assets received from J. B. Morgan, were sued as garnishees. They returned that they were in possession of the books of Morgan & Cothran, under an assignment made to them, *bona fide*, by J. B. Morgan, of his interest in the same, one-half: the other half was claimed by J. R. Bowden, under an assignment to him by Cothran.

"The plaintiffs contended that the assignment to the defendants was void. I did not think so. It might be, I thought, in another forum, that the defendants might be compelled to account to the plaintiffs, as co-partnership creditors, for the assets of the firm, but certainly at law the assignment was good. The jury, accordingly, found for the defendants."

The plaintiffs appealed, and now moved this Court for a new trial on the ground, because the partnership effects of Morgan & Cothran are not subject in law to the payment of the individual debts of J. B. Morgan; nor can Morgan's assignment make them so, until after all the debts and liabilities of the firm of Morgan & Cothran are paid, and the taking of the said effects was tortious and illegal.

Thompson, Choice, for the motion.

Dean, Trimmier, contra.

Norris vs. Vernon.

PER CURIAM. The decision below has the concurrence of this Court, and the reasons assigned in *Wilson & Co. vs. Bowden* (a) are sufficient for its vindication.

The motion is dismissed.

O'NEALL, WARDLAW, WITHERS, and GLOVER, JJ., concurring.

MUNRO, J., absent from indisposition.

Motion dismissed.

(a) Ante, p. 9.

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T. B. ROBERTS *vs.* C. B. ROBERTS.

Two judgments and *fi. fa.*s of the same date were entered—one against A. B. alone, and the other against A. B. and C. D., late co-partners. The sheriff levied on and sold land, and other property of A. B.—*Held*, that the money should be applied to the execution against A. B. alone.

BEFORE GLOVER, J., AT GREENVILLE, FALL TERM, 1854.

T. B. Roberts was plaintiff in a judgment and *fi. fa.* against C. B. Roberts, and J. B. Betts was plaintiff in another judgment and execution against C. B. Roberts and O. A. Pickle, who had been partners in trade. These judgments and executions bore the same date. Under the *fi. fa.* of T. B. Roberts, the sheriff levied on and sold a house and lot, and other property of C. B. Roberts; and this was a rule on the sheriff to show cause, why he should not apply the whole amount to the *fi. fa.* of T. B. Roberts.

His Honor held, that T. B. Roberts was entitled to the whole amount arising from the sale, and ordered the sheriff to apply the same accordingly.

The sheriff appealed on the grounds,

1. Because, from the facts before the court, the plaintiff in the case of J. B. Betts *vs.* Roberts & Pickle, was entitled to a part of the money in the hands of the sheriff, according to the lien of his judgment and *fi. fa.*
2. Because the property of C. B. Roberts, who was a defendant in the case of J. B. Betts *vs.* Roberts and Pickle, was bound by the judgment of the said J. B. Betts.
3. Because the order made by the presiding Judge in the rule in this case is contrary to law.

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Thomson, Easley, for the motion.

Young, Elford, contra.

PER CURIAM. We concur in the decision below, and for the reasons refer to *Wilson & Co. vs. Bowden (a)*.

The motion is dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurring.

MUNRO, J., absent from indisposition.

Motion dismissed.

(a) Ante, p. 9.

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THE STATE *vs.* AUSTIN ROWE AND JAMES C. VAUGHN.

A bench warrant was ordered to be issued on the charge of forgery. The warrant stated the charge to be fraud. The recognizance stated the charge to be fraud or forgery: it bore date a day or two after the commencement of the term, and required the defendant to appear on the first Monday, &c., being the first day of the term:—*Held*, that the recognizance was valid.

A warrant to arrest need not set out the offence.

It is no objection to a recognizance, that there is a variance between it and the warrant to arrest.

The bail will not be discharged although the principal be required to answer, in the alternative, to a charge of fraud or forgery.

A recognizance to answer to a charge of felony requires the personal appearance of the defendant.

Notwithstanding the Act of 1845, (11 Stat. 841,) forgery is still a felony, under the Act of 1801, (5 Stat. 397).

BEFORE O'NEALL, J., AT EDGEFIELD, FALL TERM, 1853.

The report of his Honor, the presiding Judge, is as follows:

“This was a *sci. fa.* on a recognizance entered into by Austin Rowe and his surety James C. Vaughn, conditioned that the said Austin Rowe, should appear at the Court of General Sessions of the Peace, for Edgefield District, to be holden at Edgefield Court House, for Edgefield District, on the first Monday in March instant, to answer to a bill of indictment, for fraud or forgery, and do not depart from the Court without leave.

“This recognizance was entered into the 5th of March, 1851, which was, I suppose, a day or two after the meeting of the Court, as the defendant in his cause shown alleged.

“The order for the bench warrant (16th October, 1850) stated that Rowe, the defendant, was charged with having

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altered and raised a single bill, dated about the first of May, 1848, with a view to defraud Henry H. Mays, executor of the estate of Wm. Mays, (deceased,) or the said Wm. Mays, in his lifetime; and therefore a bench warrant was ordered to issue against Rowe, the defendant, requiring him to answer to the foregoing charge.

"The bench warrant issued under this order stated that defendant, Rowe, had defrauded Wm. H. Mays, executor, and therefore directed the arrest of the defendant, Rowe. Under it he was arrested on the 5th March, 1851, and entered into the recognizance heretofore stated.

"Rowe failed to appear at that Court or any since.

"To the *sci. fa.* the defendant, Vaughn, made a return, and showed for cause why it should not be estreated, the following reasons, viz:

"1st. The non-conformity of the bench warrant to the order under which it was issued.

"2d. That the arrest of the defendant was subsequent to its return.

"3d. That the charge in the warrant was no criminal offence.

"4th. That the condition of the recognizance was void.—
1st. Because it required an appearance at a day anterior to its date. 2d. Because the charge to which the defendant is to answer is alternative "fraud or forgery." 3d. That the condition does not conform to the order or the warrant.

"5th. That inasmuch as no indictment for fraud had been preferred against the defendant, Rowe, there was no breach of the condition.

"6th. That the recognizance cannot be forfeited until Rowe be convicted of forgery, and fails to abide the sentence of the Court.

"I overruled these various objections, and ordered the recognizance to be estreated against Vaughn."

From the order estreating his recognizance, the defendant,

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J. C. Vaughn, appealed, and now moved for its reversal upon the grounds:

1. The bench warrant against the defendant, Austin Rowe, did not conform to the order of October, 1850, in respect to the offence alleged against him; his arrest under that process was not effected until subsequently to the day on which the same is made returnable; and the charge against him, set forth in that warrant, amounted to no criminal offence whatever. It is therefore respectfully submitted that the warrant in question was irregular, illegal and void; that the arrest of the said Rowe, under that warrant, was wholly unauthorized, and that the recognizance acknowledged by him to procure his liberation, under circumstances of such unlawful constraint, was in no wise obligatory upon him, or his surety thereto, the defendant, Vaughn.

2. The condition of the recognizance is objectionable in the following particulars: 1. It requires the defendant, Rowe, to appear at the Court of General Sessions of the peace, for Edgefield District, on the first Monday of March, 1851, whereas that day, at the acknowledgment of the said recognizance, was then elapsed and past. 2. It requires that the defendant Rowe, appear "to answer to a bill of indictment for fraud or forgery;" a description of the offence laid to his charge which is not conformable either to the bench warrant or to the order of October, 1850, and which is uncertain and wholly insufficient for being in the alternative, and the more so inasmuch as there is no criminal offence known to the law by the designation of *fraud*; for which causes it is respectfully submitted that the said recognizance is irregular, illegal and void.

3. It is not even suggested that the defendant, Rowe, has failed to appear and "answer to any bill of indictment for fraud;" and until such default on his part be shown, the condition of the recognizance remains unbroken.

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4. There exists no lawful impediment to the trial of the defendant, Rowe, upon the indictment for forgery that has been preferred against him: and until such trial has been had, and the said Rowe been convicted thereupon, and he fail after such conviction to appear and abide the sentence of the Court, his recognizance is in no wise forfeited.

Carrol, for the motion, cited, 11 Stat. 59; 1 Ch. Cr. L. 411; 1 Peters. on Bail, 517; 1 Ch. Cr. L. 106; 8 Peters. Abr. 349; 11 Stat. 341; 5 Strob. 63.

Bonham, Solicitor, contra, cited 5 Stat. 13.

The opinion of the Court was delivered by

GLOVER, J. The order, directing a bench warrant to issue, plainly sets forth a charge of forgery; but it is insisted that as the warrant did not conform to the terms of the order, the bail should be discharged. A warrant to arrest a party need not, necessarily, set out the offence although it is usually recited and made a part of it. The mittimus which authorizes the detention of the prisoner, after his arrest, should set forth the crime with convenient certainty; yet if he pray his discharge from custody on a *habeas corpus* the Court would look into the order, directing his arrest, to ascertain the charge.—(17 Wend. 252.)

A variance between the warrant and recognizance of bail, where the condition is, that the party shall appear and answer to an indictable offence, will not save a forfeiture, on breach of the condition; nor will the bail be discharged if his principal be required to appear and answer in the alternative, to a charge of fraud or forgery. The latter is indictable and is specified and embraced in the condition of the recognizance which is matter of record, and, when acknowledged, the presumption is that the charge has been properly preferred and the arrest legal. The defendants are not required to shew cause against

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the estreating of an obligation which enforces their appearance to answer to a charge of fraud, but to one of forgery.

That the defendant, Rowe, was obliged under the condition to appear on the first day of the term, which was a day past, is not cause to prevent an estreat as against his bail. The term is but a day, and, under a bench warrant issued in term time, the recognizance may be returnable to a day of the term. If taken for the appearance of a party upon a day on which the Court is not in session it would be void, because he could not be called nor could his failure to appear be ascertained and the breach of his bond judicially established.

The 4th ground of appeal submits, that until the conviction of the principal the bond is not forfeited. Neither the acquittal nor condemnation of the principal necessarily releases the bail. His responsibility terminates on the appearance of his principal. When acquitted, the bail is discharged because the defendant is no longer required to be present and answer. (1 Wil. 815.)

In misdemeanors, the defendant's obligation compels his appearance on the first day of the term and *de die in diem* until he has been discharged or until he has pleaded. After he has pleaded, he appears by his Attorney and his recognizance will not be estreated although he should fail to appear at each succeeding term; provided, that after conviction, he be present to receive the sentence. But where the charge is felony, the personal appearance of the defendant is required at every term to secure his presence at the trial; and as there has been no trial, in this case, the remaining inquiry is, whether forgery is a felony?

It is conceded, that at common law it was only a misdemeanor, and was so held to be in South Carolina until 1801, when it was declared to be a felony without the benefit of Clergy, and punishable with death. (5 Stat. 397.) By Act of Assembly, 1845, (11 Stat. 841,) the punishment of death was abolished, and in lieu thereof, whipping, imprisonment and a fine, were

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substituted. Does it follow, that the substitution of a punishment less than death, without a repeal of so much of the Act as declares forgery to be a felony, reduces it to a misdemeanor? It was not the penal consequences of forfeiture alone which gave character to felonies at common law, nor did capital punishment enter into the true definition of them. They were one of three classes into which offences were divided: treasons, felonies, and misdemeanors. Besides those embraced in the common law classification, there are others made so expressly by statute, or those to which the judgment of life or member is awarded as a penalty. (Hale's P. C. 703.)

If the Act of 1801 had punished forgery with death without declaring it to be a felony, then the substitution of whipping, imprisonment and fine by the Act of 1845, would have left it as at common law; but as it was also made a felony expressly by the former Act, which has not been repealed, it seems to have been the purpose of the General Assembly to change the penalty and not the nature of the offence. The convict is still a felon, but may claim the benefit of the Act imposing whipping, imprisonment and fine, and which makes it a clergyable felony.

Two English Statutes, which punish the receivers of stolen goods, have received a construction sustaining these views:—The 5 Ann. c. 31, s. 5, enacts "that if any person or persons shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, &c., he or they shall be taken as accessory or accessories to the said felony, and being legally convicted, &c., shall suffer death as a felon convict." By statute of 4 George 1, Ch. 2, "Persons convicted of receiving or buying stolen goods, knowing them to be stolen, may be transported for fourteen years." It was held that after conviction, the prisoner must claim the benefit of the latter Statute, which ousts the judgment of death. (East, P. C. 744.)

The offence which Austin Rowe was bound to answer being a felony, the Court is of opinion, that a forfeiture of his re-

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cognizance has been legally incurred, and that the order directing it to be estreated, is proper.

Motion dismissed.

O'NEALL, WITHERS and MUNRO, JJ., concurred.

WARDLAW, J., dissenting.

I dissent from so much of this opinion as holds that forgery is under our Act of 1845, a felony. I do not know what felony means with us, if it does not mean a crime which may be punished by death after either the first or the second conviction. The punishment of death can not now be ever awarded for forgery, for the Act positively abolishes that punishment in all the cases of statutory forgeries which had been previously subjected to it. And in substituting other punishment, the Act does not barely introduce a mitigation, of which the party convicted may have the benefit by praying it, but it imperatively commands the award of the substituted punishment, so that even the refusal to pray it, in lieu of death, would not authorize judgment of death. The statute 5 Elizabeth, c. 14, enacted, for the first conviction of forgery, punishment much more severe than the *maximum* in our Act; yet, by that statute, the first offence was not felony, although the second was expressly made so. By our Act I think that forgery is as it was at common law, except that for certain cases which had been mentioned in former Acts, whipping is prescribed that perhaps might not have been inflicted at common law, and the discretion of the judge as to the imprisonment is somewhat controlled.

Motion dismissed.

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HENRY LUTHER vs. NATHANIEL ARNOLD.

One tenant in common, who has leased to his co-tenant, may distrain for the rent.

Plaintiff, in replevin, must allege, that the goods distrained are his own, or that they were taken from his possession.

BEFORE WARDLAW, J., AT EDGEFIELD, FALL TERM, 1854.

The report of his Honor, the presiding judge, is as follows :

“The declaration alleged the taking of sundry goods belonging to the plaintiff, and also of some cattle and other goods of the property of certain other persons, viz: Jordan, Brogden and Glover. The defendant demurred specially, because of the mention of goods, as to which neither property nor possession in the plaintiff was alleged. The demurrer was overruled.

“The defendant avowed the taking of the goods in May, 1853, by distress for twenty-one months rent, which he alleged was then in arrear from the plaintiff to him, under a lease made by him to the plaintiff, of a lot in the town of Graniteville, on which was situate a mill.

“It appeared that the lot, on which was a valuable saw mill, driven by water, was owned by the Graniteville Company, and by that company was in 1850, or before, demised, for the term of ten years, to the plaintiff Luther and one Jordan, as tenants in common, at a fixed rent, which was all to be paid in plank during the first five years; that Jordan sold and relinquished his interest to Luther; that Luther conveyed one undivided moiety of the term to the defendant Arnold; that afterwards in 1851, by an unwritten contract between Luther and Arnold, it was agreed that Luther should have exclusive possession of the mill for three years, he paying the rent to the Graniteville Company, and moreover paying to Arnold a monthly sum,

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(which they called rent) of sixty-five dollars, to which, for any monthly payment not regularly made, should be added twenty-five dollars, so as to make the monthly sum or rent, ninety dollars; that under this agreement Luther took possession in August 1851, and held till November 1851, when the mill was burnt down, without blame to the occupant; that in Arnold's absence, but after notice to him, the mill was rebuilt by Luther, in four or five months, and afterwards was occupied by him or his sub-tenants until May 1853, when the distress was made; and that a few days after the distress, the mill was burnt a second time.

"There was nothing in the evidence, by admission or otherwise, to show that Luther had made any special agreement to repair or rebuild the mill.

"I said, what may have been understood to be an expression of my opinion upon a point made in the course of the examination of witnesses, that Luther would not, under the ordinary rules applicable to tenants, be bound for the rent whilst the mill was undergoing repairs, if he was by no covenant or agreement bound to repair, and was ready until prevented by the conduct of the supposed landlord, to relinquish his term upon the happening of the conflagration.

"But the jury did not come to this point; for I held that, under the evidence adduced, the parties were co-tenants of the term for ten years, and that the relation established between them by their subsequent agreement was not such as authorized Arnold to distrain for the money due to him, as a landlord might distrain for rent.

"Under my instructions the jury found thirteen dollars damages for the plaintiff in replevin."

The defendant appealed on the grounds,

1. His Honor the presiding judge is respectfully informed that a motion will be made at the next sitting of the Law Court of Appeals to reverse his decision, over-ruling the demurrer to

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plaintiff's declaration in replevin, which alleged that a certain part of the property distrained upon belonged to plaintiff, and a certain other and distinct part thereof belonged to third persons in which said latter part the plaintiff claimed neither general nor special property.

2. Because his Honor held that the lessee of the mill during the time that it was rebuilding was not liable for rent for the same.

3. Because his Honor ruled that one tenant in common could not lease to his co-tenant a lesser interest than each held in the term, and thereby acquire the right to distrain against the lessee who had agreed to pay a certain fixed rent.

4. And for a new trial because his Honor charged the jury that the relationship of landlord and tenant not existing in this case, the defendant had no right to distrain, although it was positively proven that the plaintiff had agreed to pay rent which was due and owing at the time, and charged the jury to find damages for the plaintiff.

Spann, for the motion, cited 5 Bac. Abr. 283, 563; Com. Land. & Ten. 368, 206; 2 Bouv. Inst. §1877; 2 Steph. N. P. 1324; 4 Kent 368; 1 Platt on Leas. 121, 131; 5 Stat. 555; 3 Kent 465; 1 Cro. Jac. 611.

Moragne, contra, cited 6 Stat. 67; *Ripley vs. Wightman*, 4 McC. 447; *Bailey vs. Lawrence*, 1 Bay 499; Co. Litt. 186 a.

The opinion of the Court was delivered by

WITHERS, J. The leading question in this case is, can one tenant in common become the landlord of another, by way of lease and exercise the right of distress. Without resorting to authority more remote, we find in Croke James, p. 611, the case of *Snelgar v. Henston*, which adjudged the question in the

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affirmative. Those parties were tenants in common for a term of years, and Henston assigned to Snelgar, and distrained; "and it was demurred, (says the book) whether one tenant in common may distrain upon the other; and adjudged that it might be, where he comes in under the lessee: and the distress may be taken in any part of the land; wherefore the defendant had return," etc.

This case is cited by several authors of respectable authority, treating upon the subject to which it refers, and we are not at liberty to discard it, when there does not occur any reason to say, (it being clear that one tenant in common may assign to another any interest he has on stipulated terms), that the assignor, bearing the relation of landlord, shall be debarred the most material incident belonging to that character. The right of distress was affirmed in this case, notwithstanding the whole term of the avowant had been transferred by him to his cotenants, which left no reversion in the grantor. In the present state of the law, as represented by Platt on Leases, (vide vol. 1, pp. 1-20), this might be a very serious objection to the right of distress—or rather, to the proposition, that a *lease* could arise out of such a transaction; or *rent*, within the meaning of statutes regulating the relations of landlord and tenant—and this, too, whether the contract be in writing and strictly formal, or by parol. Such difficulty, however, does not enter into our present case, for the whole term here was not granted, and therefore a reversion remained, which is enough to answer the most stringent definition of a lease, so far as that element of one is required.

We think, then, there was error in the ruling upon circuit that there was not the relation of landlord and tenant between these parties, and the right of distress incident thereto.

The plaintiff in replevin has declared for a parcel of goods which he alleges to be the property of others; nor does he allege the same to have been taken out of his possession. Now although this is not good cause of demurrer, seeing

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that the plaintiff has averred the taking of other goods the property whereof is alleged to be in himself, yet as the matter now stands he declares for damages for the unlawful taking of another's goods, which is inadmissible—the more palpably when he replevies them. He may not wage this contest for the benefit of a stranger, who has his own apt remedy provided a wrong has been visited upon him. The plaintiff must, therefore, amend, by averring that the goods alleged to be those of Jordan and Brogden are his own, or that they were taken from his possession. The one or the other is obviously necessary, since this action is in the nature of trespass, and it can be no trespass upon him to take another's goods unless his possession has been unlawfully violated.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

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W. T. CARTER *vs.* JOSEPH ROBBINS, EX'R.

Paying the debts of a deceased with one's own money, does not make one
executor *de son tort*.

BEFORE O'NEALL, J., AT CHESTER, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows:

"This was a sum. pro. on a note under seal of Thos. Robins, deceased, the alleged testator of the defendant. The note was proved in the ordinary way. The defence was, that the defendant was not executor. The plaintiff averred that the defendant was executor *de son tort*. This averment was attempted to be sustained in two ways: 1st., by the possession of a negro the property of the deceased. It appeared by the deed of the defendant to his son, the deceased, that the limitation over after his death was to himself, on the contingency of his dying without issue. I thought the limitation good, and held therefore, that the defendant was not chargeable in that respect. But in the second place, the plaintiff proved that the defendant paid to Hyatt a debt of the deceased. When it was first presented he said he had not then funds, but he would pay it, if he had to pay it out of his own funds. He subsequently settled it by giving his own note for it, with other debts which he owed to Hyatt. This particular note (three years past,) when presented by Robertson to the defendant, he said he would pay. Subsequently, to Hyatt, by whom it was again presented, he refused payment, saying he had no funds, and he believed the debt not to be just.

"I thought the payment of a debt the ordinary evidence of executorship, and when followed by evidence of a promise to pay the debt, the two together made out enough to satisfy me

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that defendant was an executor *de son tort*. I therefore decreed for the plaintiff."

The plaintiff appealed, and now moved this court to reverse the decree on the grounds :

1. Because there was no proof that any assets of Thomas Robins, deceased, came into the possession of the defendant.

2. Because the payment of a debt of five dollars, stating that it was paid out of his own money, and a promise to pay the debt in suit, were no evidence of such an intermeddling with the assets of the deceased, as to constitute the defendant an executor *de son tort*.

McAliley, for the motion.

Herndon, contra.

The opinion of the Court was delivered by

WARDLAW, J. It is plain that there can be no intermeddling with assets where there are no assets; and that paying the debts of a deceased with one's own money, does not make one executor *de son tort*. Although the defendant in this case may have had funds of his deceased son, and from them may have paid one debt, and promised to pay another, we see no evidence of this, and therefore direct a new trial.

Motion granted.

O'NEALL, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

Columbia, November and December, 1854.

ARABELLA E. PRAY *vs.* JAMES McEWEN.

One, who received a fifty dollar bill from the plaintiff's slave, and detained it, supposing it to be stolen, *held* bound, after advertising the bill and waiting over three years, to pay it to the plaintiff, no better owner appearing.

BEFORE WHITNER, J., AT KERSHAW, FALL TERM, 1854.

Defendant took from plaintiff's slave Jacob, a fifty dollar bank bill, supposing it to have been stolen. He advertised for the owner, but no one appeared, and after waiting over three years the plaintiff brought her action for the amount of the bill.

The bill, it appeared, was claimed by Sarah, another slave of the plaintiff. Sarah, in consideration of washing, sewing, &c., done for Cæsar, a slave of Thomas Starke, had received the bill from Cæsar, just before the removal of his master to Florida. The bill had been placed in Jacob's possession by Sarah, to purchase some articles for her in Camden, where it was exhibited to the defendant, who detained it. Sarah had no means of acquiring so much money.

His Honor decreed for the plaintiff fifty dollars; and the defendant appealed on the grounds:

1. Because (it is respectfully submitted) plaintiff's proof was not sufficient in law, to entitle her to recover.

2. Because, assuming that a bank note which had been in the possession of a slave, could be sued for and recovered by the master, the plaintiff cannot recover, because her slave obtained the note sued for in this case, from the slave of a *third person*, in traffic, which third person, upon this principle, had a prior claim.

Peay vs. McKwen.

Kershaw, for the motion, cited *Gregg vs. Thompson*, 2 Mill, 331.

Caston, contra, cited *Fable vs. Brown*, 2 Hill, Ch. 396; *Lenoir vs. Sylvester*, 1 Bail. 642; *Gist vs. Toohey*, 2 Rich. 424.

The opinion of the Court was delivered by

WARDLAW, J. If the woman Sarah rightfully acquired the fifty dollar bill, it thereby became the property of her mistress, the plaintiff. The defendant, who honestly stopped the bill and advertised it, under the belief that an owner better than Sarah would appear, has no right himself to appropriate it; and such time has elapsed that it may be fairly presumed that no better owner will appear, and that the plaintiff's claim, if much longer delayed, might be barred by the Statute of Limitations. Whatever suspicions may be entertained concerning the honesty of the possession which was in Cæsar, from whom Sarah obtained the bill, and who got it we do not know how, the silence of Mr. Starke, (Cæsar's master,) notwithstanding the advertisement, raises the implication of his assent to the executed transaction between Cæsar and Sarah, so as to take from the defendant the excuse of a right in Starke, to authorize the further detention of the money.

The case falls within the principles established by *Gist vs. Toohey*, (2 Rich. 424,) and the cases therein cited.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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Columbia, November and December, 1854.

J. E. WALKER vs. J. J. BERRY.

Defendant in *sum. pro.* being served with interrogatories to answer "whether he had purchased the goods charged in the account sued on, on credit, and at the prices charged;" answered, that he had, but that he had paid the account;—*Held*, that plaintiff was entitled to a decree—defendant's answer as to the payment not being evidence for him.

BEFORE WHITNER, J., AT SUMTER, FALL TERM, 1854.

Sum. pro. on an open book account. The defendant was served with the following interrogatories :

"1. Were the articles charged in the within account, purchased by you from the plaintiff, or his clerk, on credit?

"2. If not, then state if any of the articles, and which of them, were purchased by you on credit?

"3. Are the prices charged those you agreed to pay?

"4. Are the prices charged reasonable?

"5. If not, then state what would be reasonable prices for the articles charged?"

The defendant answered as follows :

"The defendant, James J. Berry, being called upon to answer, on oath, certain interrogatories in the above stated case, personally appeared before me, and made oath as follows :

"1st. The articles charged in the account (the cause of action) were purchased by this defendant from the clerk of the plaintiff on credit. The last item is interest, but that he has paid up the whole account.

"2nd. Answered in answer to first interrogatory.

Walker vs. Berry.

"3rd. The prices charged are those agreed to be paid by this defendant; but no interest was agreed to be paid.

"4th. The prices charged are reasonable.

"5th. Answered above."

His Honor decreed for the defendant; and the plaintiff appealed, and now moved this Court to reverse the decree, on the ground that the answer of the defendant, as to the payment, not being responsive to any interrogatory propounded to him, his Honor erred in treating it as evidence.

Richardson, for the motion.

Blanding, De Saussure, contra.

PER CURIAM. In this case it is only necessary to refer to *Clark vs. Meek*, 2 Bail. 391. According to the rule settled by that case, the defendant's answer, that he had paid the debt, could not discharge him.

The decree ought therefore to have been for the plaintiff. But inasmuch as it is alleged *here*, that the defendant, if the Court had not ruled in his favor, might have given other evidence, a decree will not be *now* rendered for the plaintiff. Another opportunity of discharging himself properly will be given to the defendant. A new trial is therefore ordered.

O'NEALL, WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurring.

New trial ordered.

Columbia, November and December, 1854.

JAMES KNIGHT *vs.* WILLIAM KNOTTS.

Defendant gave plaintiff his note for eighty dollars "for the hire of his boy Tom." In an action of assumpsit for employing Tom in a way contrary to the agreement, whereby his death was caused, *held*, that it was admissible for the plaintiff to show the terms of the contract of hiring by parol.

BEFORE WARDLAW, J., AT ORANGEBURG,
FALL TERM, 1854.

THIS was an action of assumpsit. The plaintiff alleged that the defendant had agreed not to employ, in certain ways, Tom, a slave of plaintiff's, which he hired for the year 1852; and that he did so employ Tom, whereby his death was caused.

The plaintiff adduced a note, dated January 2, 1852, made by the defendant, payable to the plaintiff, or bearer, twelve months after date, for eighty dollars, "it being for the hire of his boy Tom." Testimony of conversations between the parties, at and before the making of the note, to show an agreement concerning the way the slave should, or should not, be employed during the hiring, was objected to by the defendant, as parol addition to the written contract contained in the note; but was admitted by his Honor, the presiding judge.

The case was left to the jury, who found for the plaintiff eight hundred dollars.

The defendant appealed, and now moved this Court for a new trial, on the ground, *inter alia*,

Second. Because it was in evidence that the contract for the alleged breach of which the action was brought, was reduced to writing; and it is respectfully submitted that his Honor erred in ruling that parol testimony^a as to a parol contract was admissible.

Knight vs. Knotts.

Glover, for the motion, cited 2 Stark. Ev. 573; *Ib.* 1076; Phil. Ev. 772; *Wood vs. Ashe*, 1 Strob. 412; *Gazoway vs. Moore*, Harp. 401; *McDowall vs. Beckley*, 2 Mill, 265; *Falconer vs. Garrison*, 1 McC. 209; Saund. on Pl. & Ev. 137; 1 Chit. Pl. 385.

De Treville and Whaley, contra.

Hutson, in reply.

The opinion of the Court was delivered by

O'NEALL, J. In this case the first ground of appeal was abandoned.

The second was very ingeniously presented by the appellant's counsel. But it is a clear mistake to suppose, that a note for the payment of a sum for the hire of a slave is the contract of hiring. The contract whereby one agrees to let another have the services of a slave for a given period, is the consideration of the note.

The latter might, if the parties chose, have set out the whole contract. But this note merely promises to pay so much money, eighty dollars, "for the hire of his (the plaintiff's) boy Tom." It is necessary to resort to oral testimony to ascertain how long he was hired: and it may equally well be ascertained by the same kind of testimony, what he was hired to do, and in what manner he was to be treated.

This is neither alteration of, nor addition to a written contract. We are unanimously, therefore, of opinion, that the verbal proof was properly admitted.

The facts were properly submitted to the jury, and their verdict cannot be disturbed.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1854.

HENRY KOON, ADMINISTRATOR OF LUCY SOUTER, *vs.* JAMES
M. IVEY.

Sci. fa. by administrator of plaintiff to revive a judgment founded on a note. Defence, that before judgment recovered plaintiff had assigned the note to the wife of the defendant and the heirs of her body—the assignment to take effect after the death of the donor:—*Held*, that defendant was estopped by the judgment from making the defence.

BEFORE O'NEALL, J., AT UNION, FALL TERM, 1854.

THE report of his Honor, the presiding judge, is as follows :

“This was a *sci. fa.* on a judgment recovered by the intestate against the defendant, on the 24th of October, 1844, for one thousand two hundred dollars, with interest from the 11th of May, 1844.

“The defendant's defence rested upon a deed made by the intestate, conveying to Dolly Ivey, the wife of the defendant, and the lawful heirs of her body, after the death of the donor, her real estate, and the personal property as thus described : ‘my wagon, and all my household and kitchen furniture, and one table, *with all other property that I am or may be possessed of during my life.*’

“This deed was executed 5th September, 1844. The note on which the judgment was founded, was made before the execution of the deed, but the judgment was subsequent to it.

“I thought the judgment could not pass under the deed. It could only convey property existing at its execution. The note was merged in the judgment, and could not now be regarded, *at law*, as passing under the deed. The plaintiff had, therefore, a verdict and judgment of revival.”

The defendant appealed, and now moved this Court for a new trial, on the ground,

Koon vs. Ivey.

Because his Honor erred in deciding that the deed from Lucy Souter to Dolly Ivey and her children, did not cover the note, and the judgment predicated thereon, in this case.

Herndon, for the motion.

Dillard, contra.

The opinion of the Court was delivered by

WARDLAW, J. The judgment conclusively established an indebtedness of the defendant, in October, 1844, growing out of the note upon which it was founded. The defence now offered to the *sci. fa.* is in effect, that such indebtedness did not exist, because prior to the judgment the note had ceased to be the property of the plaintiff in the judgment. This is bringing under review now matter before adjudged, and cannot be permitted. If events supervening the judgment have given interests to third persons, which require the administrator, present plaintiff, to use the recovery for the benefit of those persons, remedies are not wanting to prevent injury to equitable assignees.

This Court has no information upon which it could rely in looking beyond the parties before it.

The motion is dismissed.

O'NEALL, WHITNER, GLOVER and MUNRO, JJ., concurred.'

Appeal dismissed.

Columbia, November and December, 1854.

THE STATE *vs.* IRA ARNOLD.

Where a civil action by the owner, and a prosecution instituted by a third person, are both pending for the same offence of harboring a slave, the owner may, nevertheless, be required to elect on which case to proceed.

- When either case is ready for trial the defendant may require the election to be made.

BEFORE WHITNER, J., AT ANDERSON, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“ A true bill was found at this term against the defendant, for harbouring a slave, and placed on the calendar docket. A bail writ had been issued and returned to this term, on which the defendant was arrested, and bail required in the sum of one thousand dollars. The defendant was in jail and had been for some months. Whether in virtue of the warrant or the bail writ, I cannot now state, though he had either given bail in the civil process or entered into recognizance on the warrant. When the case in the sessions was called, his counsel announced his readiness to proceed to trial, and submitted a motion ordering an election of the remedy to be pursued.

“ The solicitor moved for a continuance, not being ready on the part of the State to proceed with the trial, and resisted the motion requiring an election of the remedy, avowing his purpose to prosecute both cases, unless restrained by the court, and alleged that the prosecution had not originated at the instance of the owner of the slave, by whom the suit at law had been instituted.

“ In conformity with long established practice, I continued the case in the sessions on the motion of the solicitor. I also refused to grant the order asked for at this stage of the proceedings. I confess, however, if I had not felt constrained to

State vs. Arnold.

hold my hand by previously adjudged cases indicating a different course, my own construction of the Act of Assembly, in view of the circumstances before me, would have led to a different result."

The defendant appealed.

Sullivan, for the motion, cited 7 Stat. 460; *State vs. Stein*, 1 Rich. 189; and contended, that under the Act the owner alone could prosecute. The State should therefore be ordered to abandon the prosecution. When the master institutes no prosecution, a civil action by him, is itself an election.

Reed, Solicitor, contra. The prosecution here is not by the owner. This is, therefore, no case for election under the Act. Election can only be required where the owner both prosecutes and sues; 2 Bail. 392.

The opinion of the Court was delivered by

GLOVER, J. The Act under which the defendant was indicted (7 Stat. 460), provides, "That if any white person shall harbor, conceal, or entertain any runaway or fugitive slave, such person shall be liable to be indicted for a misdemeanor or prosecuted in a civil action for damages, at the election of the owner or person injured," &c.

The election of the remedy is given to the owner or person injured; but it does not follow that a stranger cannot prosecute for the misdemeanor. The intention of the legislature was, that the owner or person injured should not avail himself of both remedies. When the indictment and civil action are both pending, and either is ready for trial, the party may be put to his election, which case he will try. The commencement of a civil action first, neither bars the indictment nor determines

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his choice. A defendant may plead the trial of one in bar to the other. *State vs. Stein*, (1 Rich. 189!)

The motion is therefore granted, and it is ordered, that unless the owner of the slave or person injured shall inform the Clerk of the Court for Anderson District of his election, on or before the first day of January next, the recognizance be discharged.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion granted.

Abel vs. Hutto.

ARIEL ABEL vs. BENJ. HUTTO AND MARTIN HUTTO.

New trial granted in an action of trespass to try title, the jury having found for the plaintiff, who claimed by adverse possession, against the weight of the evidence.

A party claiming title to land by adverse possession, must show *clearly*, not only that his possession was adverse, but that it was for the full statutory period. If there be doubt on either of these points, the possessory claim must yield to the legal title.

BEFORE WHITNER, J., AT LEXINGTON, FALL TERM, 1854.

This was an action of trespass to try title. The paper title to the land was clearly in the defendant, Benj. Hutto, who claimed under a grant issued in August, 1793.

The plaintiff claimed under a grant to Gibson, dated May 4, 1829. Gibson conveyed to Sarah Johnson, April 2, 1830. She died in 1847, and under proceedings for partition the plaintiff became the purchaser of her interest. Sarah Johnson had been in possession several years, and much evidence was given upon the questions as to the extent and length of that possession, and whether it was adverse.

Contrary to the charge of his Honor, the presiding Judge, the jury found for the plaintiff; and the defendants appealed on the ground that the verdict was contrary to the evidence, and the charge of the presiding Judge.

Desaussure, for appellant.

Boozer, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case, there is no doubt, that the title to the land is in Benjamin Hutto, unless that title has been

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divested by a possession of ten years, under color of title in Sarah Johnson. In such a case, I lay down the proposition broadly, that it is the business of the party claiming by possession to show clearly, that his or her possession has been both adverse and also long enough. If there be doubt on either of these points, the possessory claim must yield to the legal title. This has the sanction of *Rochell* ads. *Holmes*, as far back as 2 Bay, 487. In *Cantey vs. Platt*, 2 McC. 262, Judge Huger says, "It is, however, the duty of this court to guard with vigilance such rules as have been established for the protection of the freehold, and not to permit so important a right to depend upon the whim and caprice, or the loose impressions, of a jury. "It will be recollected he was speaking of a finding in favor of a possessory claim. In the same case he said most truly and justly, "To enable a plaintiff to succeed in his statutory claim to land, he must prove, that he has had possession of the land the full time required, by the statute law." "He must show the extent of his possession to enable the jury to fix his metes and bounds, and his possession must, moreover, appear to have been *adverse*."

These authorities are enough for the preliminary proposition which I have stated.

In this case, the possession of Sarah Johnson under color of title, must begin with her deed 2d April, 1830; if that possession continued, in her own right, for ten years before there was a possession under the legal title, it would clearly establish her right. But the judge below tells us, with 1840, by which he means the beginning of 1840, the defendant, Benj. Hutto, the owner of the elder grant and legal title, took actual possession. This prevented the constructive effect of Sarah Johnson's possession, and confined her to her "*pedis possessio*." How can a verdict giving the whole land covered by her deed be sustained? It is said the jury had the right to decide whether they would believe that the defendant's possession commenced as early as the beginning of 1840. But such a position would

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in every matter of doubt, place the legal title at the discretion of a jury. I agree with Judge Huger, in *Cantey vs. Platt*, that this is the very case in which this court is bound to control them, and not to suffer title to be defeated by their caprice.

Again, what was the character of her possession? It is proved by various witnesses, that she agreed to pay rent to Benj. Hutto. He actually sued for and recovered his rent. So under the Landlords' and Lessors' Act, he obtained the order of the Magistrates' and Freeholders' Court, to restore the possession to him. How is this met? By her evasions, or denials to other witnesses. Can this do more than to render the character of her possession doubtful? Certainly, if the decisions in *Harrington vs. Wilkins*, 2 McC. 289; and *Markley vs. Amos*, 2 Bail. 608, in which declarations such as if the heirs of Porter "would produce a grant and establish the lines, he (H.) would pay them for the land, or buy it of them:" or if M. ever produced his grant, "he would give it up, or could but give it up," were ruled to make the possessions subordinate to the legal title, be law, then unquestionably the proof *here* is enough to have the same effect.

The motion for a new trial is granted.

WHITNER, GLOVER and MUNRO, JJ., concurred.

WARDLAW and WITHERS, JJ. We dissent, considering that the facts have been settled.

Motion granted.

Columbia, November and December, 1854.

CATHERINE BENSON, ADMIN'X. OF WILLIS BENSON, *vs.*
TILMAN D. COLEMAN.

Action by the administrator of the vendor upon notes given for the purchase-money. No conveyance of the land had been executed, but the vendor had given bond to make titles, and the defendant was in possession. Defendant claimed an abatement because there was title paramount in a third person to part of the land. A survey, without notice to the vendor, from copy-deeds from the register's office, the declarations of the vendor, and proof of claim made by a third person, *held* to be *prima facie* evidence of paramount title, entitling the defendant to go to the jury upon the question of abatement.

BEFORE GLOVER, J., AT GREENVILLE, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of assumpsit on two promissory notes for four hundred dollars, dated the 4th January, 1851. The consideration was, in part, for a tract of land, sold by the intestate to the defendant for one thousand dollars. On the same day that the notes bear date, the intestate executed his bond to make titles, in which the land was described as the Benson tract, containing two hundred acres, more or less, and bounded, &c.

"The defence relied upon, was a want of title in the intestate to about thirty-seven acres of the land, which, it was alleged, the description in his bond embraced. No paper title was offered in evidence, nor had the defendant (who has been in possession since his purchase) been disseized: nor had there been any possession on the land adverse to the intestate's title.

"The jury was instructed, that where there was no eviction of a defendant, who remained in possession, under his purchase, in receipt of the rents and profits, and showed no title para-

Benson vs. Coleman.

mount to the vendor's, he cannot set up a defect of title. That there was evidence of a fraudulent purpose on the part of the intestate, after the sale, and that the defendant had made a strong case for relief; but that his possession had not been disturbed, nor was there any proof of an outstanding title which was paramount to that under which he entered and held, and that his remedy, if he has any, was not in this Court. A verdict was rendered for the plaintiff for the amount of the notes and interest."

The defendant appealed, and now moved this Court for a new trial on the grounds:

1. Because his Honor, the presiding Judge, charged the jury that the confessions and admissions of Willis Benson, as to his having sold lands which did not belong to him, would not avail the defendant in his defence to the notes for the purchase money of the land as a discount or deduction for so much as the said lands were worth.

2. Because his Honor the Judge charged the jury, that, although the said Willis Benson admitted, after bargaining the land to defendant, taking his notes for the purchase money, and giving him his bond for titles, that thirteen acres of the said land belonged to his sister, Mrs. Green, and twenty-four acres of the same tract to his mother, Mrs. Benson, that these admissions could not avail the defendant in his defence.

3. Because his Honor charged the jury that it was incumbent on defendant to produce the title deeds, showing the said thirteen acres, and the said twenty-four acres, did not belong to the said Willis Benson, but to other persons at the time the notes were given by defendant.

4. Because his Honor charged the jury that the defendant's appropriate remedy was in the Court of Equity, and that his defence could not avail him in this Court.

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5. Because his Honor charged the jury, that the defendant had made out a very strong defence, indeed, and one which would avail him in equity, yet he refused to charge the jury that they might, from the testimony, presume fraud on the part of Willis Benson in selling lands to defendant which did not belong to him, and, therefore, make a deduction from the notes for the lands thus sold.

6. Because his Honor the presiding Judge, by his charge to the jury, took the case out of their hands, except to find for the plaintiff the amount of the notes sued on, with interest, and left them no discretion to find any other verdict.

7. Because the verdict of the jury was contrary to law and evidence in finding the full amount of the notes given for the purchase money of a tract of land, when the vendor had never made any titles to the defendant for the land, and admitted, after the bargain, that he had no titles for thirty-seven acres of the tract sold, and it being in proof that the defendant never had possession of this portion of the tract.

Perry, for the motion.

Young, contra.

The opinion of the Court was delivered by

WITHERS, J. The defendant is vendee of Willis Benson, deceased, of a certain tract of land, and holds Benson's bond to make titles, upon payment of the purchase money; the vendee has entered upon the premises, and resides there. He is sued upon notes for four hundred, part of one thousand dollars, the purchase money: six hundred have been paid in cash. The defendant insists upon an abatement on the ground of fraud generally, but when interpreted, he means, that there is paramount title to two

Benson *vs.* Coleman.

parcels of land, to wit.: thirteen acres and twenty-four acres, which the intestate knew before the sale, and his declarations are adduced to shew that, and that he meditated an imposition upon him (the defendant). A survey of the land, without notice to the vendor, and with only copy deeds from the Register's office, had been made, and the surveyor said that Stringfellow Benson owned a parcel of land which he designated. It was in evidence, that after the sale, the intestate said he could get the whole tract back, and that he had no title to certain parcels, which he indicated—that a part of that referred to, belonged to his sister Frances—that he would get back his land from the defendant, and six hundred dollars besides. It appeared also that a party who went into possession of ten acres, though under intestate, had paid without his knowledge, however, rent to Frances Green, and her husband had forbidden the defendant to exercise acts of ownership over it.

Such is substantially the evidence of outstanding paramount title which the defendant would have addressed to the jury as warranting an abatement of the sum claimed in this action. It was, indeed, before the jury. But the presiding Judge instructed them that such evidence was unavailing, at least in the Law Court, for that where there was no eviction, and the purchaser remained in possession, under his purchase, in receipt of the rents and profits, and shewed no title paramount to the vendor's, he cannot set up a defect of title, —that this defendant's remedy, if he had any, was alone in Equity.

This instruction is understood here to import, that the defendant had offered no evidence fit for the consideration of the jury, that there existed a title to any part of the land paramount to the vendor's, in whose right the action is brought.

It is in this we think there was error. This defendant did not come for a rescission—which this Court cannot effect, since

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it cannot enforce reconveyance, nor in other respects place the parties *statu quo*. He claimed to have an abatement by way of discount, and alleged that his evidence, for that end, was, *prima facie*, sufficient, and so put the plaintiff under the necessity to rebut it. This, we must presume, was convenient for the plaintiff—since the muniments of the intestate's title must have been, if they existed at all, in her possession, or within her power to produce. At all events, the plaintiff was bound to rebut such a defence, and we think there was evidence enough to put her to that necessity.

Allowing that Coleman might have a rescision, or other relief, in Equity, it does not matter. If he was entitled at law to go to the jury, upon an issue of fact, and had offered no more than *prima facie* evidence, he is not estopped, even although he might have sought greater relief in another forum. He might have encountered there the doctrine, that he had clear and adequate remedy at law. That he, in fact, had, touching the matter of defence he urged, will be abundantly established by recurring to what is said upon the subject in *Van Lew vs. Parr*, 2 Rich. Eq. 321. We think the defendant had the right to take the sense of the jury upon his *prima facie* evidence, and, therefore, the motion for a new trial is ordered.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion granted.

Hodges vs. Cobb.

GEORGE W. HODGES vs. JAMES H. COBB.

L. W. advanced to T. M. four thousand dollars, to be used in buying and selling negroes, and agreed to settle one-half of the nett profits to the sole and separate use of the wife of T. M. There were executions against T. M. at the time, and he was insolvent. T. M. purchased negroes, and after the death of L. W. settled with his administratrix. Some two or three weeks after the settlement, the administratrix executed a deed, by which she conveyed some of the negroes which had been purchased by T. M., and which had remained in his possession ever since, to a trustee for the sole and separate use of his, T. M.'s wife, the same being intended to represent one-half of the nett profits of the traffic:—*Held*, that the transaction was valid against the execution and other creditors of T. M.

An insolvent husband may stipulate beforehand, that the proceeds of his labor shall be appropriated to the sole and separate use of his wife, and such stipulation is no fraud upon his creditors.

BEFORE O'NEALL, J., AT ABBEVILLE, SEPTEMBER,
EXTRA TERM, 1854.

THE report of his Honor, the presiding Judge, is as follows:

“This was an action of trover brought for the recovery of the value of a negro woman named Milly and her children. The whole case turned upon the title; and that depended upon facts about which there was little or no dispute.

“The late Leonard J. White was a man of large means. He and Tarleton P. Mosely married sisters, the daughters of the late Donald Douglass, of Abbeville.

“Mr. Mosely failed in business, and made an assignment to Mr. White, to whom he was largely indebted.

“To benefit Mrs. Mosely, Mr. White, on the 10th of February, 1849, advanced three thousand dollars to be employed by Mosely in buying and selling negroes; ‘the one-half of the profits arising from the said three thousand dollars,’ the said White agreed ‘to make over to Frances E. Mosely, the wife of

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T. P. Mosely, 'in such manner, as will not be liable for the debts of the said T. P. Mosely;' This was evidenced by a writing under the seals of the parties, the said L. J. White and T. P. Mosely.

"On the 2nd of July, 1849, a further advance of one thousand dollars was made, and an instrument under seal was executed by L. J. White, in which he recited both advances, and stated that Mosely had been and was to be engaged in buying and selling negroes as his (White's) agent, and for his entire use and benefit, and that he was to account to him when called on for the capital of four thousand dollars, and the nett profits therefrom realized; and White bound himself 'to make over, settle and fix upon Frances E. Mosely, the wife of the said Tarlton, for her sole use and benefit one-half of all the neat profits, that has or may be made on and with the aforesaid four thousand dollars, in the trade and traffic aforesaid, in such way and manner that the said one-half of neat profits shall not be liable or subject to any of the creditors, or heirs of the said Tarlton P. Mosely, except the said Frances E. Mosely.'

"The negroes Milly and her children were bought by Mosely as the agent of White, in the city of Richmond, Virginia, on the 15th of February, 1850.

"Leonard J. White died the last of March 1850; administration was granted to his widow, Celestia A. White, who was his only heir, on the 4th of May, 1850.

"On the 28th of June, 1850, Mrs White executed a deed of trust whereby she conveyed to the plaintiff the slaves in dispute, with another negro and other property, 'in trust to and for the sole and separate use of Frances E. Mosely, wife of Tarlton P. Mosely, for and during her natural life, not subject to or liable for the debts or contracts of her present or any future husband, with the full power to the said Frances E. Mosely with the consent of her said trustee, G. W. Hodges, to dispose of said slaves,' 'by deed or will;' failing such disposition, then 'to her child or children at her death, discharged

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from all trust ;' failing a disposition by deed or will and child or children at her death, then 'for the use, support and maintenance of Tarlton P. Mosely for life,'—'then to his children, if he should have any ;' 'if he should have no children, then to Drusilla Douglass, Catharine M. Wilson, and Mary M. Glymph, equally divided to their sole and separate use and benefit, not subject to the debts or contracts of their husbands, in fee.'

"Mrs. White, now Mrs. James M. Cochran, was examined for the defence ; she stated that she executed the deed to carry out her husband's agreements. She had a settlement with Mosely, under the agreements with her husband, Mr. White ; the negroes now in dispute and the other property mentioned in the deed, was the half of the neat profits, which, as she said, fell to Mosely's share, under the agreements ; they were in Mosely's possession five or six weeks before the deed was executed.

"I see from copies of Mrs. White's receipts to Mosely for the proceeds of the trade in negroes, to Mr. White's death, that they bear date the 7th and 12th June, 1850. The first of these is therefore, I presume, the period of the settlement twenty-one days before the deed.

"On the 28th of November, 1850, Mrs. White advanced to Mosely six-thousand three-hundred and thirteen dollars and sixty-two cents to be used, as her agent in the buying and selling of negroes for her use and benefit, and the whole profits were to be for the use of Mrs. Mosely.

"Various executions against Mosely were given in evidence ; under them the sheriff seized, and on being indemnified proceeded to sell the slaves ; public notice was given of the deed of trust, which had been duly recorded in the office of the Register of Mesne Conveyance at Abbeville, and in the Secretary of State's office, Columbia. The slaves were purchased by the defendant, Jas. H. Cobb, who refused to deliver them to the plaintiff on demand.

"The jury were instructed that the slaves were the pro-

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perty of Leonard J. White (deceased); that they so remained until there was a settlement and division.

“Up to that time, the creditors had no pretence of claim. There was a division between Mrs. White, the administratrix, and Mosely, and unquestionably, if it had not been for the agreements between him and White, the negroes would have been his, and the deed would have been void against his creditors.

“But the division was in pursuance of those agreements, and the deed in conformity thereto. The deed was therefore good, unless there was fraud in the previous agreements. I must confess I have never been able to discover any ground on which I could say there was fraud.

“White it was conceded furnished the money; he had the right to say in what way the profits should be disposed of. If the jury found anything in the case to justify them in believing that the money employed was Mosely's, then indeed I thought there might be ground to declare the deed fraudulent.

“It is very true, I said to the jury, that a man's creditors could not compel him to labor for their benefit; all that they had a right to demand was his property.

“I thought and so said to the jury, that if upon the settlement the slaves had been delivered to Mosely as his own, that then the subsequent deed could not control them; but the fact was they were left in his possession under Mr. White's agreements; and the subsequent settlement in conformity thereto was no more than the Court of Equity would have decreed.

“The jury found for the plaintiff.”

The defendant appealed, and now moved this court for a new trial on the grounds:

1. Because his Honor charged that in the contract between L. J. White and T. P. Mosely, for trading in slaves, there

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could be no fraud, unless the money upon which the trading commenced, was the money of T. P. Mosely.

2. That the contract for trading in slaves signed by L. J. White and T. P. Mosely was a *valid* and *bona fide* contract, and that under such contract T. P. Mosely might labor for life for L. J. White, and that White could settle the property acquired by, or profits of, such labor beyond the reach of his (T. P. Mosely's) creditors, upon his wife or child.

3. That the legal estate was proved to be in the plaintiff, and that *if there was fraud* in the transaction, it might perhaps be reached in equity but not at law.

4. Because his Honor charged the Jury that, looking at the case as he did, it was difficult to see how they could find otherwise than a verdict for the plaintiff, to the amount of the value of the slaves.

5. Because his Honor charged that, the only event upon which there could be a verdict for defendant would be upon the supposition that the slaves, after the settlement for the trading, were delivered to T. P. Mosely; but that, in point of fact, they were not so delivered. Whereas we submit that the slaves were always in the possession of Mosely up to the time of the settlement and after, till the execution of the deed of trust.

6. Because his Honor should have charged that, under the contract between White and Mosely, one-half of the profits of the trading belonged to Mosely; and that so soon as acquired in the shape of property, the lien of the creditor's executions attached upon it, and that the deed of trust as against creditors of Mosely conveyed nothing.

7. That the verdict was contrary to law and the evidence.

Wilson, for the motion.

McGowen, contra.

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The opinion of the Court was delivered by

WITHERS J. White and Mosely married sisters. In 1849 Mosely was hampered by judgments and executions, and was in fact insolvent. White, being affluent, advanced money which Mosely was to use in buying and selling negroes and to return to White the principal and the nett profits, who stipulated that he would settle one-half of those profits upon the wife of Mosely (whose trustee the plaintiff here is) in such manner as to exclude it from the reach of Mosely's creditors. Mosely, in pursuing his traffic upon the money so advanced, purchased in Richmond, in February 1850, Milly and her children, (the subjects of this action of trover), and had them in possession in March 1850, when White died. Mosely accounted with Mrs. White, administratrix and sole heir of her husband, in the forepart of June 1850, for principal and nett profits, in pursuance of the agreements with White in his lifetime, and some days afterwards (not exceeding 16 from the date of the last receipt given by Mrs. White,) she conveyd Milly and her children, as well as other effects, to the plaintiff, as trustee of her sister, Mrs. Mosely, the same being intended to represent one-half the nett profits of Mosely's traffic, which White had agreed to settle on Mrs. Mosely. The negroes had continued in the possession, or custody, of Mosely from the time he bought them until they were so conveyed. Under executions against Mosely before referred to, the sheriff seized and sold Milly and her children to Cobb, the defendant here, who defends upon the ground, that he is clothed with the rights of Mosely's creditors on judgments and executions—and that as to them the negroes were Mosely's, inasmuch as the agreement between him and White worked a fraud upon them by smuggling the fruits of his skill and labor into a form that should benefit his family and indirectly himself, whereas his creditors were and are entitled to such fruits. It is further urged for Cobb that the legal right to the negroes vested in Mosely and became subject to their executions, because of his possession for a space

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of time (from sixteen to twenty-one days) between the settlement with Mrs. White, and her conveyance to the plaintiff, as trustee.

It is under circumstances, thus briefly stated, that the point of the case arises, the jury having found a verdict for the plaintiff under instruction, that the lien of the creditors' executions did not attach upon the negroes, and that the transaction between White and Mosely, executed as it was, worked no fraud upon creditors.

All must agree that if Mosely had been so unmindful of the duties of life as to work not at all, or for half price, or for nothing, his creditors could not have pricked him up, with their executions. That he should have left his family to starve would have brought neither consolation nor profit to them. What stimulated his exertions—what produced the fruits that make the subject of this litigation? The answer is, that a benevolence of White; a stranger to Mosely's creditors, towards Mrs. Mosely, his sister-in-law, set in motion the debtor's industry; and the use of White's capital, Mrs. Mosely being the meritorious cause and object, produced the fruits now in contest. These have been created by a cause, and a means over which the creditors had no control, and from whose liens they were wholly free, and when they were in posse merely were devoted, by agreement, to an object most worthy in the eye of all sound morality. It is very true, on the other hand, that this debtor could not have set apart the fruits of his labor, after they had been earned, in trust for his wife and children. But if he had agreed to sell his labor to White, on terms the most improvident, as for his mere maintenance or for less, how could his creditors have rectified that? If he had made a more reasonable and thrifty contract with White, as, for example, that he would labour for him, on condition that he would maintain his wife and children, and articles consumed in the use were accordingly applied, what fraud would there be, in such case, upon creditors—what scope would have been found

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for their executions—what would they have lost to which they could show any title? If White, by the promptings of a benevolent sympathy, should have agreed to add something more enduring, in the hands of a trustee, for the use of the wife, no infringement of a creditor's right can be detected in that.

Although it is conceivable, that, under stipulations such as characterize this case, an insolvent debtor might be enabled to engage his labor and skill upon means, trusted to him by a benevolent friend of his wife, upon previous stipulations so liberal as to endow her trustee with a sum large enough to make the transaction seem a mockery in the eye of a creditor, and although we admit that, in an adventure so fortunate, his just expectations would be sadly disappointed, yet the question would still be as to the range of his execution, not his expectations; and, on the other hand, we see that the principle of this appeal would make it a fraud, if, in pursuance of a debtor's stipulation in the morning, the proceeds of a day's work by him should be applied, in the evening, in the shape of bread towards the maintenance of his family. Neither difference in sums, nor in time, fortunate or unfortunate adventures, provident or improvident contracts, in a debtor's selling his labor by previous stipulation, can alter a principle.

As to the possession by Mosely of the negroes during some days after adjustment of accounts with Mrs. White, and before her transfer of them in trust, it seems clear, that he held them as property of White's estate. No one seems to have regarded that possession in any other light, and it is not perceived how he could have repudiated the right of property in that estate. Now, there being no perceivable fraud on the part of White, if the conveyance to the plaintiff were set aside, it would seem obvious that the title in the negroes would be found lodged in White's estate. We do not perceive how Mosely, or his creditors in his stead, could have recovered from White's representative, the half of the profits arising from Mosely's traffic, for that is repugnant to his stipulation, and the negroes represented that

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sum of profits, though it must be conceded that if the deed to the plaintiff was fraudulent and void, he could not have recovered in this action. Observations have been made, to show that it was not; and such being our conclusion, the motion is dismissed.

O'NEALL, WARDLAW, WHITNER and GLOVER, JJ., concurred.

Motion dismissed.

A. O. NORRIS, COMMISSIONER IN EQUITY, vs. A. B. COBB,
JOSIAH W. COBB, AND W. A. WILLIAMS.

When an action is brought upon an injunction bond, the law court may look into the proceedings in equity which led to the giving of the bond, in order to determine its validity.

The commissioner may grant a special injunction requiring security for the forthcoming of property, which is the subject of a bill in equity.

An order by the commissioner, that "a special writ of injunction do issue," is too general, and void.

Such a general order may be cured by the writ, if that state the matter specially; but then the writ must be a judicial act, and be signed by the commissioner himself.

The commissioner has no authority to grant a special injunction requiring the defendant to give security, that he "will not waste the estate of his testator, now in his hands as executor, and will fully account for the same."

Failure to pay a mere money decree cannot be a breach of any bond which a commissioner may rightfully take under a special injunction.

BEFORE WHITNER, J., AT ANDERSON, FALL TERM, 1854.

THIS was an action of debt on an injunction bond. A. B. Cobb was the principal, and the other defendants his sureties. The bond was taken in the case of *Parris vs. Cobb*, to the

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report of which, in 5 Rich. Eq. 450, reference should be had for a full understanding of this case. In *Parris vs. Cobb*, the Commissioner, on December 17, 1850, granted an order, as follows:

“On hearing the bill and affidavit, I am of opinion, that a special writ of injunction be issued. It is, therefore, ordered that a special writ of injunction do issue.” On the same day a writ of injunction, addressed “to all and singular, the sheriffs of the said state” was issued. This writ recited, “that the said A. B. Cobb, executor, is about to dispose of certain slaves of great value, which are claimed by the said complainants, and otherwise waste the estate of the testator, which tends to the great prejudice and wrong of the said complainants.” Its mandatory part was, as follows:

“Therefore, in order to prevent this injustice, we do hereby command you that you do, without delay, cause the said Amaziah B. Cobb, personally to come before you, and give security, or sufficient bail, in the sum of thirty-five thousand dollars, that is to say, a bond in the sum of five thousand dollars, that he will not dispose of the slaves Caroline, Harriet and Ann, and their increase, or any or either of them, nor carry them beyond the jurisdiction of this Court, and a bond in the sum of thirty thousand dollars, that he will not waste the estate of the said Henry Parris, now in his hands as executor, and that he will fully account for the same. And in case he shall refuse to give such bond or bail, or security, then you are to commit him to prison, there to be kept in safe custody until he shall do it of his own accord.”

Under this writ, on December 21, 1850, the bond sued on was taken. It was in the penalty of thirty thousand dollars, and its condition was, as follows:

“Now, the condition of the above obligation is such, that if the above bound Amaziah B. Cobb, executor, ‘will not waste the estate of the said Henry Parris, now in his hands as executor, and will fully account for the same,’ and further stay and abide the judgment of the said Court in this behalf, then

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this obligation to be void and of none effect, or else to remain in full force and virtue."

On July 16, 1853, the commissioner submitted his report, showing that there was a balance due by the executor of over three thousand dollars. The report was confirmed in December, 1853, and it was to recover this amount that the action was brought. The grounds on which the defendants resisted a recovery will be understood from the report of his Honor, the presiding Judge, which is as follows:

"This action was brought to recover for an alleged breach of an injunction bond. The first named defendant was principal, and the other defendants sureties. The record of a case in equity, *William Parris and James Hickey and wife vs. Amaziah B. Cobb and others*, constituted the principal evidence. The plaintiff will furnish, therefore, as part of his printed brief, extracts of so much of the papers as may be necessary to a full understanding of the points raised, especially the reports of the commissioner, the order for injunction, writ and bond taken on the arrest of defendant.

"The validity of these proceedings was contested by defendants' counsel, on several grounds. There was no proof of any order from Chancery directing suit on this bond. There was proof that the name of the commissioner to the writ of injunction was signed by another person, though at his request, as he was called away from his office whilst it was in the course of preparation. The deputy sheriff who made the arrest and witnessed the execution of the bond, was of opinion the bond was not read over to or by the surety, Williams. The decree in Chancery confirming the report of the commissioner in equity, may perhaps be sufficiently referred to in a recent volume of reports. A *fi. fa.* for amount of decree and costs was lodged 9th February, 1854, and returned 10th February, 1854, 'no property to be found.' Amaziah B. Cobb has resided in the district from day of arrest until the day of this trial. The defendants, J. W. Cobb and W. A. Williams, were

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not made parties to the proceedings in equity. After the argument of counsel had been heard on both sides, my views on the legal points raised by defendants were stated; and on each favorable to the plaintiff. I was not satisfied that the evidence of a breach of the bond was sufficient to entitle the plaintiff to recover against W. A. Williams, the avowed object of pursuit in this case. This was not an undertaking to pay a debt incurred by the principal to testator, Henry Parris, in his lifetime; or to pay any decree that might be rendered against him, or to pay for any waste of the estate committed before the bill was filed. With the view of ending the litigation, I would gladly have taken a verdict for the sums claimed, but the account stated so commingled the indebtedness and liability of the principal, as to render it difficult and impracticable to refer them to the terms of the obligation. Entertaining these views, and lest the plaintiff might be prejudiced by a verdict, if other proofs could be had, in reference to a waste of the estate, I intimated, if counsel preferred, they might submit to a nonsuit, with leave to move the Court of Appeals to set it aside. This was acquiesced in, and a nonsuit was ordered, because there was not sufficient evidence of a breach of the bond. So much seems necessary, in reply to the eleventh ground of appeal."

The plaintiff appealed, and now moved this Court to set aside the nonsuit, and for a new trial, on the grounds,

1. Because (it is respectfully submitted) the action was against A. B. Cobb, as well as his sureties, J. W. Cobb and W. A. Williams, and the plaintiff was certainly entitled to a verdict against him, even if the numerous defences insisted on for the sureties were well-founded in law.

2. Because his Honor held that the condition of the injunction bond of the defendants was not broken by the failure of A. B. Cobb to pay the decree in equity, although the condition

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of the bond was "that the said A. B. Cobb will not waste the estate of the said Henry Parris, now in his hands as executor, and will fully account for the same, and further stay and abide the judgment of the said Court in this behalf," &c.

3. Because his Honor, the presiding judge, held, that the defendants were not liable, on the injunction bond sued upon, for any waste of the estate of Henry Parris, deceased, committed by the executor, A. B. Cobb, anterior to the date of the injunction.

4. Because his Honor held that the statement of A. B. Cobb, in his answer in the equity case, that the negroes ascertained by the decree in that case to be of the estate of Henry Parris, were sold by him, claiming them as his own, anterior to the injunction bond, was conclusive evidence that the waste which he had committed as executor, was anterior to the time when the sureties became liable by signing the bond.

5. Because his Honor held the defendants were not liable, under the terms of the bond, for the money decree which the Court of Equity had pronounced against A. B. Cobb, the executor, although that money decree was the result of an accounting of the liability of A. B. Cobb as executor.

6. Because the record in the equity case, in which the injunction was issued, shows, conclusively, that A. B. Cobb was charged, as executor, with certain negroes and property, *as the estate of his testator, Henry Parris, deceased*, and the money decree was only rendered as a substitute for the property, and as a measure of the extent of his liability.

7. Because the Court of Equity did not ratify the sale of the negroes said to have been made by A. B. Cobb, when claiming them as his own, but charged him, as trustee for the next of kin, *with the property*; and only measured his present liability by his admission of what he had sold them for previously.

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8. Because the mere statement of A. B. Cobb, that he had previously sold the negroes, was no evidence of the fact, which is denied. But if he had previously sold them, that is not the only evidence of waste, and time of its commission.

9. Because his Honor held and ruled, that there was no evidence of waste subsequent to the 15th of October, in the year of our Lord one thousand eight hundred and fifty, the date of the injunction bond, notwithstanding the Court of Equity had held A. B. Cobb liable as executor, and had rendered a decree against him for the sum of three thousand one hundred and thirteen dollars and seventy-six cents, besides interest.

10. Because waste may be committed by spending money, as well as by squandering property of an estate, and there was no evidence that the proceeds of the negroes were spent before the injunction bond was given.

11. Because, in any view of the case, his Honor ought to have submitted the case to the jury upon the question, whether the waste was committed before or after the injunction bond was given.

12. Because A. B. Cobb was executor of the will of Henry Parris, and trustee for his next of kin, as to the property not embraced within his will, and on this account the condition of the bond "not to waste the estate" of his testator, and to account therefor, was proper, and covers the money decree rendered in the Court of Equity against the executor.

13. Because the ruling of his Honor was contrary to the law and evidence, and will operate, if not corrected, to do injustice to parties in interest, and to give A. B. Cobb the fruits of a well-concocted and deliberate fraud.

McGowen, for the motion. It is sought to charge the sureties with the amount decreed for the value of the slaves sold by

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Cobb in 1848. The bond is that he will not waste the estate now in his hands. The money arising from the sale was then, at the date of the bond, December 21, 1850, in his hands. Such is the presumption of law and fact. He has not paid it under the decree. He has, therefore, wasted it. The negroes having been decreed to belong to the estate of the testator, the money arising from the sale was also part of the estate in the hands of the trustee.

Cobb was an express trustee, and as such the Court of Equity had full power to require him to give bond not to waste the estate. The bond was given, and it is now sued on; and we have shown a *devastavit* since its date, to wit, the decree for the money and the return of *nulla bona*.

But the bond requires him to fully account. How has he accounted? Surely the decree itself is not the account meant? He must pay it.

The question whether Cobb had wasted the estate after the date of the bond, was one of fact, and should have been submitted to the jury. If he had the money, or securities for its payment, at the date of the bond, then the waste has been since. The mere change of the property into money or notes was not waste. The money or notes became impressed with the trusts—became part of the estate. For wasting that we complain. *Wightman vs. Brown*, 1 Des. 166; 1 Des. 167; 1 Ves. & B. 541; 8 Johns. R. 126; 2 Hill, 592.

Then had the commissioner the right to require such a bond? Contended that he had under the Act of 1840.

The signing of the writ of injunction was a mere ministerial act; and the commissioner might give authority to another to sign it for him. 2 Mad. Ch. 183; 3 Bro. C. C. 218; 5 Ves. 91; 1 Ves. & B. 129.

Vandiver, contra, cited 3 Danl. Ch. Pr. 1833. The order for a writ of injunction is void for indefiniteness. It should have specified for what it issued—stated what the defendant

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was required to do or not to do. The commissioner may grant orders conformably to the rules and practice of the Court. The practice is to specify what is to be done. This order specifies nothing, and is void.

But the order authorises a writ of special injunction. If the order is good, the writ is void, for it is not a writ of special injunction. It is a writ of *ne exeat regno*. 3 Danl. Ch. Pr. 1942. A writ of injunction commands the party. This writ commands the sheriff. One is to the party, to do or not to do a specified thing—the other commands the sheriff to arrest the defendant, &c. 2 Tidd. Pr. 1128; 1 Arch. Pr. 320; 2 Sellon, Pr. 61; 16 Eng. C. L. R. 244.

Then as to the writ. It was not signed by the commissioner. If the commissioner has authority to appoint a deputy, it must be to do a mere ministerial act. As the order did not specify the terms, the writ in fixing them was judicial, and could not be signed by deputy. The directions as to what was to be done were judicial. But there are other objections to the plaintiff's recovery. 1. The writ is void for not specifying what property was not to be wasted. 2. There is no order that the bond be put in suit. 3. No *ca. sa.* has been issued, and one should have issued before suit on bond. 4. No breach of the bond has been shown. No waste has been committed since the date of the bond. It was committed by the sale of the negroes two years before. 3 Danl. Ch. Pr. 1856, 1886, 1907–8. An injunction operates prospectively. It lies not to repair an injury already done. Here the object is to make the defendants liable for an act already done. It is an attempt by means of an injunction bond to secure a debt.

Perry, in reply. Cobb was a trustee for the parties. They had the right to go into equity to remove him—to require him to give security to protect the property until the right could be determined.

Was there a breach of the bond? The sale not itself waste

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It was an act which justified the requiring the bond for the protection of the property. It showed that the estate was in danger. When the bond was given the estate consisted of money or notes. That is not forthcoming to satisfy the decree—it has been wasted. There is, therefore, a breach of the bond.

Signing the writ of injunction was a ministerial act. But the commissioner afterwards recognized it, when he signed the sheriff's return to the writ.

The order for the writ must be understood to mean such writ as the bill prayed. The bill prayed for such a writ as was issued.

"The estate of Henry Parris" are the terms used in the writ. That sufficiently specifies the property.

Then as to the bond. Suppose the writ be void, is not the bond good as a voluntary one?

Failure to pay over the money is a breach of the bond. The *onus* of showing that it has not been wasted is on the defendants.

The opinion of the Court was delivered by

O'NEALL, J. In this case, it is necessary, before entering on the consideration of the merits, to consider a preliminary objection, that the Court of law cannot examine any of the proceedings had in equity, which lie behind the bond.

This is, to my mind, a strange proposition. The Court of Equity has no power to enforce this bond. Suit must be brought on it at law. Why? Is the mockery to be gone through, that the bond, when here presented, is to be pronounced legal, binding and proper, because it comes from another forum? Surely not. If it were so, it would make the Court of Equity not only supreme, and compel the law Court to follow it, where the position of the two tribunals, and the laws are directly the reverse; but would also give a con-

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structive effect to the bond not sanctioned by the Court of Equity. That Court has decided nothing touching the bond; the plaintiff has not even the license of his own Court to sue the bond.

I would be as unwilling as any one to touch the jurisdiction of another tribunal. But I am not to be frightened from examining the validity of an instrument sought to be enforced in a law Court, because it may come from the Court of Equity.

Mere irregularities in proceedings in equity, as was decided in *Harvey vs. Huggins*, 2 Bail. 252, cannot be examined in a law Court.

But where, as in the *Commissioner vs. Phillips*, 2 Hill, 631, the commissioner exceeded his powers in the requirements of his order, and the writ issued under it, a bond is taken in conformity thereto, as was adjudged in that case, I would hold it to be taken by duress, and void at law. The opinion in that case, it ought to be remembered, was pronounced by our eminent Chancellor (Judge Harper), then a member of the Appeal bench. It cannot be supposed that he would have trenched upon a jurisdiction, of which he was as bright an ornament as ever adorned it in this state!

Having now prepared the way, I propose next to examine the proceedings under which this bond was taken. To do so satisfactorily, it is desirable to know what is an injunction? An "injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing." 3 Dan'l. Chan. Prac. 1809. A special injunction is one that arises out of the special circumstances stated in the bill. That the commissioner may grant a special injunction, requiring security for the forthcoming of property which may be the subject of a bill in equity is settled by the opinion of the court in the case of *Aldrich vs. Kirkland*, decided in the Court of Errors at this term, and by the case of *Ellis vs. Commander*, 1 Strob. Eq. 188.

The Commissioner in the case in hand, made an order, that

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“a special writ of injunction issue.” For what purpose, or commanding the party to do, or to refrain from doing, what particular thing? No one can tell. Such an order is as void as a general search warrant. It is true, if the commissioner had sealed the writ, and it did not go beyond his authority, it might have cured the defect. But he did not, and it is now no more than the solicitor’s writ, and cannot help out the defective authority under which it issued.

The writ, however, goes entirely beyond the commissioner’s authority. For it requires in this behalf, that “the executor will not waste the estate of Henry Parris, now in his hands as executor, and that he will fully account for the same.” This is requiring the defendant to give surety for the payment of the eventual decree. This, *Aldrich vs. Kirkland* decided the commissioner had no power to require.

It would hence according to the case of the *Commissioner vs. Phillips* appear, that a bond taken under such proceedings would be taken without legal authority under color of process, and therefore by duress, and be void. But the bond went still further, and in express terms required the executor “to stay and abide the judgment of the court.” As Judge Nott said in *Livingston vs. Livingston*, 2 Mill, 428, I have never seen such “a tissue of irregularities:” and more than irregularities, such *erroneous* assumptions of powers and authorities.

But if the bond was freed from these fatal objections, I do not see how a breach of the condition is shown. The decree is a mere money decree, and according to *Aldrich vs. Kirkland* cannot be a legal breach of any bond, which the Commissioner could rightfully take under a writ of injunction issued by him.

These views sufficiently dispose of the case and show that the nonsuit was right as to all parties.

The motion is dismissed.

WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

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WARDLAW, J. In the case of *Aldrich vs. Kirkland*, decided last week in the Court of Errors, I endeavored to state the principles which I think are applicable to cases like this. Under those principles, I consider that this bond, which has been brought into the Court of Law by the proper officer of the Court of Equity, has been brought with the sanction of that Court; but still I cannot but admit, that if it was originally void, no subsequent recognition of it by others could give it validity against the supposed obligors. If it had been taken under a proper order, and the condition was merely "that Amaziah B. Cobb should not waste the estate of Henry Parris in his hands as executor," I think I could reach a result favorable to the plaintiff. In such case, I would not venture to say that the Court of Equity could not order such a bond and direct the process which should be used in enforcing its order. I might see in the bill, and affidavit which accompanies it, a seeming distinction between that portion of the estate which had been "disposed of," and that which was "in the hands" of the executor. But I would confine myself to the terms of the obligation, and remember that the estate of a testator consists of choses in action, as well as of tangible property—that the debts of the executor to the testator were part of the estate, and part which was in the hands of the executor—that when the final decree had cancelled the deed to A. B. Cobb, the negroes contained in that deed were thereby in effect declared to have been the testator's at his death; and when in lieu of surrendering them specifically, the executor was required to pay certain sums as the prices he had received for them, and to account generally, his sales were thereby confirmed, and he made debtor to the estate for those sums, as well as for anything that previously he owed the estate. The decree I would regard as a decision, that the sum finally ordered to be paid was then in the hands of the executor; and the return of *nulla bona* on the *fi. fa.* against him, I would take as evidence of his subsequent *devastavit*.

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But the order and condition are not such as I have supposed. First, The condition, "further to stay and abide the judgment of the said Court in this behalf," is unauthorised by the writ of injunction. Second, The condition, "fully to account for the same" [the estate], although conformable to the writ of injunction, is not authorised by the order, even if that order, to save it from indefiniteness, is referred to the bill. Third, The condition, "not to waste the estate of the said Henry Parris now in his hands as executor," is conformable to the writ of injunction, and to the prayer of the bill, but the writ of injunction itself is, I think, void; because in the mode which was adopted for issuing it, it was a judicial act, and was not passed upon by the commissioner himself. It is with great diffidence that I say anything concerning equity practice. I would recognize as proper any matter of practice which was approved by a Chancellor, where any such matter, sustained by the order of a commissioner, which was within the debateable limits of his power, and was not set aside by a chancellor, after opportunity for a motion to set it aside had been given. But I am obliged to reject, as the act of a judicial officer, that which was not done by himself, and which he could not depute to another. I do not intend to dispute that a commissioner might authorise a deputy to affix the seal of his office, even to sign his name to a writ. I will admit that a deputy might do anything which pertains merely to the duties of a register, where (as in Charleston), the commissioner's duties are divided between a master and a register. But the objection here is that, in the mode which was adopted, the writ was not a mere execution of an order, such as a solicitor or register might prepare, under the directions given by the order, but was itself the initiative of various important matters of discretion, which had been mentioned in no previous proceeding. The order simply authorized a writ of special injunction to issue; the writ amplified and extended the order, so as to declare what should be enjoined, how obedience should be compelled, how many bonds should

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be taken, and in what penalty each should be. Who decided these grave matters? They should, I suppose, have been settled in the order; they should, I am sure, not have been left to the discretion of the complainant's solicitor, or of a deputy, appointed to execute the prescribed matter-of-course formalities in issuing a writ. As to all of them, except, perhaps, the purpose of the injunction, the bill is as silent as the order; and after all the assistance which practice might be supposed to give in eking out the directions given by what precedes, it is plain that much must still have been left to the good pleasure of him who drew the writ.

I regard the writ then as the mere act of the solicitor, having no more authority than if no order whatever had preceded it. The bond taken under it was obtained by duress, and, in my opinion, is wholly void.

Motion dismissed.

State vs. Shooter.

THE STATE vs. B. SHOOTER AND OTHERS.

Indictment for a conspiracy to pervert legal process to the unlawful purpose of extorting a deed from J. M., charging that defendants executed their purpose by the concerted means. Verdict—guilty, which the Court of Appeals refused to disturb.

The deed, which was extorted, was a conveyance of land from J. M. to L. G., one of the defendants. Evidence, in behalf of defendants, to show that the paper title to the land was already in L. G., was excluded on circuit, and on appeal *held*, that, under the circumstances, it was properly excluded.

Indictment for a conspiracy to extort a deed by means of a peace warrant:—*Held*, that the offence of conspiracy might be made out, although the affidavit to obtain the peace warrant was true.

The conspiracy may be criminal, although the purpose be merely to get possession of land by means of an extorted deed in favour of the legal owner.

BEFORE WITHERS, J., AT MARION, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows:

“The defendants were indicted for a conspiracy; Berry Shooter was described as a constable, and Benjamin Shooter as a magistrate, and it was imputed to them, together with the other defendants, William Goodyear and Lovit Goodyear, that they intended, unlawfully, deceitfully, and fraudulently, to extort, &c., from one John D. Morris a deed of conveyance to the defendant, Lovit Goodyear, for a certain tract of land. The indictment then charged that the defendants “did, corruptly and unlawfully, conspire together to extort, obtain, and procure of and from the said John D. Morris, the said deed of conveyance, for the use and benefit of the said Lovit Goodyear, and, in order to extort, obtain, and procure the same, did then and there corruptly and unlawfully conspire, under color and pretence of legal process, to arrest and imprison the said John D. Morris and Esther Morris, his wife; and that the said Ben-

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jamin Shooter, so being a magistrate as aforesaid, in furtherance of their said conspiracy, afterwards, to wit: on the same day and year aforesaid, upon the oath of the said Lovit Goodyear, did issue a peace warrant against the said John D. Morris, and Esther Morris, his wife, and then and there delivered the said warrant to the said Berry Shooter, so being a constable as aforesaid; and the said William Goodyear, in furtherance of their said conspiracy, did then and there propose to compromise and suppress the said warrant, and to prevent further proceedings being taken thereon against the said John D. Morris and Esther Morris, his wife, if he, the said John D. Morris, would execute the said deed of conveyance to the said Lovit Goodyear for the said tract of land; and that the said Benjamin Shooter, so being a magistrate as aforesaid, the said Berry Shooter so being a constable as aforesaid, the said Lovit Goodyear and the said William Goodyear, in pursuance of their said conspiracy, afterwards, to wit: on the same day and year aforesaid with force and arms, at Marion Court House aforesaid, in the district and State aforesaid, unlawfully, fraudulently, deceitfully, and corruptly, did extort, obtain, and procure of and from the said John D. Morris, so being in custody as aforesaid, the said deed of conveyance for the tract of land aforesaid, under color of legal process, and also under color and pretence of compromising and suppressing the said warrant, and preventing any further proceedings being taken thereon against the said John D. Morris and Esther Morris, his wife."

"The prosecution had produced the testimony of John D. Morris and his wife, as to the circumstances of the whole transaction, the only portion of which that related to the title to land was to the effect, that he (Morris) had, a few days anterior, come to the house, his wife in company, where his father had been residing, for the purpose of killing and curing hogs for his father; that on the morning of the day of arrest Lovit Goodyear had demanded possession of the land, and that he

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said to Goodyear he could not give up the place then—(as will appear more at large in the notes of testimony.)

“The defendants proposed to adduce the title of Lovit Goodyear, (there being no evidence that Morris, the prosecutor, claimed any title,) and I rejected the evidence, on motion of the Solicitor, since I could not discern how the issue involved the title, or how the State, upon the issue joined, could conduct a contest upon that question, it appearing to me, that if the title of Lovit Goodyear were ever so clear, the issue still remained—made by the indictment. Still the defendants had the benefit of testimony, to the effect that Shooter, the magistrate, affirmed that a deed from Morris was of no use, for Goodyear’s title to the land was good enough; and also, that Morris, on the morning after he executed the deed, said he wished Goodyear well of the land, for he knew he had paid well for it. So much for the first ground of appeal.

“No evidence whatever had been adduced to show that Lovit Goodyear had any ground to warrant him in causing Morris and his wife to be arrested and bound over to keep the peace; on the contrary, Morris swore he made no threats, and the woman declared that she had never seen Goodyear but once before, and knew nothing about him. It had also appeared that Shooter, the magistrate, though ruled at the instance of the Solicitor, had not returned the affidavit of Lovit Goodyear and the warrant issued thereon, nor did he produce them at the trial. These circumstances were matters of pointed observation to the jury, on the part of the State, and I submitted them also to the consideration of the jury, and it being urged for the defence that a verdict of guilty pre-supposed perjury in Goodyear, I remarked that this was not necessarily so, that even if Goodyear had shown ground to authorize him to make an affidavit, yet if there was a conspiracy to use such a process as he had caused to be issued, not for the purpose of procuring articles of the peace, but to accomplish the purpose charged in the indictment, Lovit Goodyear might, nevertheless, be guilty;

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at the same time I took care to say to the jury, that a false affidavit by Goodyear would not make the magistrate and constable liable to any charge, unless they were implicated with Goodyear, by confederation, in the ulterior design traceable to him.

“As to the third ground, I did say to the jury that a conspiracy to use a peace warrant for the purpose of driving a party to make a deed, so as to extort by such means from him an abandonment of *possession* of land, would be the offence of conspiracy.

“As to the fourth ground, I have no other means of responding to it than by a report of the entire evidence, which is herewith submitted, in the form of notes taken at the trial.

“The jury rendered a verdict of guilty.”

The testimony of John D. Morris and Esther, his wife, upon which the case was principally decided, is as follows:

“*John D. Morris*: I know defendant; was arrested on a peace-warrant on Saturday, sunset, 1st of January, 1853, by Berry Shooter, a constable, on a warrant issued by Benjamin Shooter, a magistrate; Lovit Goodyear made the affidavit; my wife was also arrested at a place where my father lived.— On the morning of that day, Lovit Goodyear came and demanded possession of the place, saying it was his time; he had bought the place from Rogers, I think, to whom my brother Solomon had sold it; I had come up there with my wife to kill hogs for my father; I lived in Horry; I said I could not give up the place then; he said “It’s law you want, and I’ll give you a belly full of law,” and went off. After I began salting, about sunset, I heard a hail at the Gap, and went and found Berry Shooter, Christopher Huggins being with him, who said he had a precept; I asked what; he said a peace warrant for me and my wife; I asked him who had taken it; he said Lovit Goodyear; asked if I would give up; I said I did not think it was worth while, it was night, and I was busy

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and I didn't know it was necessary to give up to that warrant ; he said his father was at William Goodyear's, (not a mile off,) and I had as well go ; he would give me a chance, very like, to get security ; I said I was always willing to comply with the laws of the country, and asked him to read the warrant, and I said I would go and try to give security without giving any further trouble. My wife signified she would not go ; said it was cold and night ; I persuaded her to go, and we went ; she had a child one year and eight or ten days old with her ; I went off in my shirt sleeves ; it was cold, but I expected to go no further than William Goodyear's, and would get security. We went to William Goodyear's, Jr., and met Squire Benjamin Shooter ; he said " Well, Morris, it appears you are interested here in taking possession of Love Goodyear's land." I said I had gone there to kill hogs for my father. He asked if that was my wife ; I said it was. He said " If I was you I should hate to have her carried and put in jail ;" I said I was not going to do so, and if he did or the rest of them send her to jail, I could not help it ; he said she was a very fine little woman, and he would hate to have her put in jail ; he said, " Morris, I like you very well, regard you as a nice little man, let's make it up—drop it ;" that he had three or four more warrants against me ; that I had better give up my claim to that land, for the warrant would put us in jail, and if I gave security they would have me put in jail with the others. I said I could not ; did not know how to make up a peace warrant without giving security. He said I had not security there, and he would have me carried out to his office, and make a mittimus to carry me, wife and child, to jail, without I would make it up and quit Lovit Goodyear's land. I said I had not security there, but if he would let me go off and get security I would leave my wife there till I did it ; I knew I could give good security. He said it was out of his power to do anything with it but to carry me to his office and commit me to jail, for he could not give me the opportunity, for young William Good-

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year was there, and was going to have it carried on. William Goodyear, Jr., said he was not going to give any limited time to go off and give security. (William Jr. was Lovit's son.)—Benjamin Shooter then said he must go on to his office. I said I was without my coat, and asked Berry to go back so I could get my clothes, and I would go on with him—that I would pay him what it was worth to go back and let me get things for my child and wife; he said he was tired, and would not go back any more. Benjamin Shooter said he must go home, and “I can't make it up with you; you have become the damndest fool I ever saw, and it is the damndest rascally trick I ever knew a man to do for going and taking possession of Love Goodyear's land.” We then started to his office. Benjamin Shooter asked young William Goodyear to go with us. We went in a direct course to his office till we came to Allen's bridge, and there got in company with John W. Moody, Pinckney Shooter, and one Walls. Jno. W. Moody said he was there to keep Benjamin Shooter from going over, for one arch of the bridge fell that day, and said “Morris, what is the muss with you and your wife and child here?” I said I was arrested with a peace warrant, and asked him if he would stand my security until Monday morning; that I would be certain to meet him here at the Court-house. He said he would and held up his hand and said he would stand our security till Monday morning at the Court-house. Benjamin Shooter, with an oath, said he would not take him. Moody said “Stop, let me go and see a little something about it.” He and William Goodyear went and talked together a little while, and he came back and said, “I am a particular friend of yours; let's make it up.” I told him I could not make it up without giving security, and they would not let me go off and get it; he said he would give me \$10 and clear me of all those warrants, if I would sign a quit-claim deed to that land; I told him I would not at that time. Berry Shooter said “I will put in some, and we will give you \$15.” Benjamin Shooter said he would

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see it paid, and clear me of all these other warrants and that one, if I would give a quit-claim deed to that piece of land; he said "We can't do nothing with him; I know where I can go and stay all night, and I am going," and went back to old William Goodyear's. Berry Shooter pressed John W. Moody to go back with us; Jno. W. Moody kept pressing me to make it up, and at last I told him I would make it up and give a quit-claim deed for \$25; he said they could not give so much, but would give \$15; we went to old Billy Goodyear's, and found Benjamin Shooter there, William Goodyear, Sr., John Freeman, Josiah Davis, and Sally Price; Jno. W. Moody, Berry and Benjamin Shooter again insisted I should make it up, and they would clear me of all these warrants and give me \$15 if I would make a quit-claim title to the land; I at last told them that from the circumstances of my family, child and wife, I would give them a quit-claim; Moody wrote the deed; I signed it. Josiah Davis was one of the witnesses; Benjamin Shooter asked me to deliver the deed; I asked to read it; he said I had written it right; you need not read it, deliver it to young Bill Goodyear; I began to read, and went so far as "Know all men by these presents," when young Wm. G. snatched it out of my hands, and I threw out my hands and said "Go with it;" I was then released and my wife. (Paper produced; conveyance from Jno. Morris to Lovit Goodyear, for \$15 consideration; warranty; witnessed by John W. Moody and Josiah Davis; dated 1st January, 1853.) I did not think of reading the deed before signing, but began to read it before I delivered it, when it was snatched; it was past midnight when the deed was signed.

Cross-Examined.—I went to the place on Thursday before Saturday, 1st January; carried nothing but our clothes; walked there; we stayed partly in house my father stayed in—one night in a house my brother stayed in; I carried to Solomon's a bed of my father's house; I did not go to stay the year, and left on Sunday morning. I did not go to take pos-

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session ; did tell Patrick Lewis I had a right to take possession of that land if my father was willing ; this was some time before I went, as stated ; I told Lovit Goodyear on Saturday morning that I had not possession, and could not give it now ; I put my father's bedding in another house, and fastened as I found it ; I opened it by the key-hole with a knife ; it was the house Solomon lived in. Goodyear said he had a right to the possession ; Goodyear had possession of a mill on the land ; it was between fifty and one hundred yards distant from the house. Bill Goodyear, Wm. Ford, jr., and Elias Goodyear, were with Lovit when he came and demanded possession ; don't know I said more to him than I have stated on Saturday morning.—Berry Shooter, on starting, did say I had better take my coat, perhaps ; I replied I would see the magistrate, and thought I could get security ; he refused to let me go and get security ; did not, as I recollect, propose that my wife should go on, and Berry would go with me to fetch sureties to the house. Berry Shooter was wet ; they were getting timber somewhere there on Pee Dee ; don't think Berry S. offered to go with me to get security ; I did not refuse to go with him to hunt security ; Christopher Huggins was with Berry S. and me most of the time ; Berry said he was willing for me to go and get security, if Benjamin S. was ; the last did not offer to take my wife back, and advise me to go for security ; some of the party offered my wife a chance to ride ; think Wm. Goodyear offered his coat to be put round the child ; Jno. Moody was on the other side of the bridge ; a light was soon brought ; I was told the bridge had fallen that day ; Moody said it was risking life to go over ; Huggins and Moody present when Berry Shooter offered to put up some of the \$15—and near when magistrate said he would see it paid, and destroy the warrants. Think Josiah Davis, old Mrs. Goodyear and Sally Price, were up when we got to old Goodyear's ; we got supper ; Benjamin Shooter was there ; think rather he was sitting in the hall by the fire ; he spoke of a guard that night if I did not make it up ; I think

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he told Moody to draw the deed; don't remember he declined to do it himself. I made no threats against Lovit Goodyear, or any other man.

Mrs. Esther Morris: I am wife to Jno. D. Morris; 1st January, '58, we were at his father's. Berry Shooter and Christopher Huggins came and arrested me, and carried me to young Wm. Goodyear's; Benj. Shooter said Jno. D. M. was the damndest rascal he ever saw, for taking authority of land from Lovit Goodyear. Morris wanted to give security, and Benj. S. said he should not take it. I had my child: it was very cold weather; Benj. Shooter would not let me go and get clothes for the child. I was arrested on a peace warrant, at the instance of Lovit Goodyear. Never saw him but once before that time; knew nothing of him; had made no threats against him. Benj. S. wanted M. to make up for \$15 about the land; if he would he would free him—if not, he would put us in jail. We went finally to Allen's bridge, along with Huggins, Benjamin and Berry Shooter; saw there Pinkney Shooter and John W. Moody; a good deal said there. Moody offered to stand our security till Monday morning here; Benj. S. would not take it; said he knew where he could get to the fire, and he would go. Moody and Wm. Goodyear, jr., had a talk, and then all advised Morris to make up—and offered \$15 if Morris would, and give a right to his claim on the land. Benj. S. advised him as a friend to make it up, and if he did not, three or four more warrants were coming; if he would they would drop it all, and pay all costs. We went on to old Wm. Goodyear's; found there the family; Freeman, Josiah Davis—Benj. S. went before Squire S., and Berry again there proposed to make up; Morris stuck out; at last he said before he would have his family exposed so he would give the right; it was pretty late; they never paid a cent to Morris; I did not see Morris write his name to a paper; he asked to read the paper, and started, and young Wm. Goodyear jerked it out of his hand, and the Squire said it was right. Mr. Moody wanted a dowry

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out of me; I refused. We stayed there that night—but when it was made up we were discharged. Benj. S. said, after the settlement, to Morris, he could go or he could stay, if they would let him.

Cross-Examined: When we left Horry I expected to stay away but a little while. I had started to my father's in North Carolina. I carried some of my things there, and had some things awhile at old Mrs. Morris' house. Morris (my husband) got into Solomon's house, and put a bed in it, and fastened it as it was before; did not nail it. At Wm. Goodyear's, jr., Benj. S. offered \$15 to make it up. My husband wanted at young Wm's. to give security; Benj. said he did not want security no how; he wanted the title; Morris asked magistrate to let him go and get security; he refused; think Huggins and Berry were then present. Young Wm. Goodyear offered me a horse, and a coat to cover the child; I refused both.—Did not hear Moody speak of giving a bond; said he would stand security for us to be here on Monday morning; Benj. refused it; and he and Berry then first again proposed a settlement. Morris asked none of them to go back; Moody proposed to come home; Morris did not ask him to remain.—On the road for the bridge Berry did not propose to go with Morris to hunt security. Squire S. was sitting by the fire when we got to old Goodyear's. Think I saw Josiah Davis when I got there. I and Mrs. Goodyear, and Sally Price, were in the kitchen part of the time. Benj. Shooter always refused to let Morris give security, and he threatened to put him in jail, and there keep him, if he did not make the title; and that others—Davis, &c., were sitting by the fire at old Goodyear's—heard this.

Other evidence was given, both for the State and in behalf of the defendants, which it is deemed unnecessary to report.

The defendants appealed and now moved this Court for a new trial on the grounds:

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1. Because his Honor erred in rejecting the evidence of title in the defendant, Lovit Goodyear, to the land, for which the offence was alleged, to procure a deed, upon the ground of irrelevancy, when it is insisted that, inasmuch as the evidence relied upon to prove the offence was wholly circumstantial, the proof of title offered was relevant and competent as a circumstance to rebut the presumption that the affidavit applied for was to procure a deed for the said land.

2. Because his Honor erred in charging the jury that it was immaterial whether the affidavit taken by Lovit Goodyear was true or false. That if it was true, and applied for, obtained and used by the parties for the purpose of extorting the deed, the offence was proven.

3. Because his Honor charged the jury that, admitting the title of defendant, Lovit Goodyear, to be good to the land, and the deed from Morris of no avail, yet, if the process was designed and used for the purpose of getting the prosecutor out of possession of the land, the parties could be convicted of a conspiracy under the indictment.

4. Because the evidence was not sufficient to warrant the conviction of the defendants of conspiracy at common law, or under the statute of 33 Edward I.

Harlee, for appellants, cited 4 Bl. Com. 136; Went. Pl. 79; 1 Hawk. 76; 2 Hill, 282; 2 Russ. on Cr. 493, 694; 13 East, 225.

McIver, Solicitor contra, cited Whar. Cr. L. 495; 1 Stra. 193; 1 Salk. 174; 10 Eng. C. L. R. 262; 1 Leach, 45.

The opinion of the Court was delivered by

WARDLAW, J. The charge against the defendants is in effect that they corruptly conspired to pervert legal process to the unlawful purpose of extorting a deed from John D. Morris, and that they executed their purpose by the concerted means. No exception to the indictment has been taken; and

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only the general objection to the evidence, which is contained in the fourth ground of appeal, questions the sufficiency of the matters, which were shewn, to constitute a case of conspiracy. The truth of a concert, in which all the defendants were implicated, was found by the jury: that the concert was of such kind as to make the offence of conspiracy, will appear plainly from an examination of one case, the *State vs. De Witt & Watts*, (2 Hill, 282,) which contains a careful exposition of law, concerning this somewhat undefined offence; and if all the testimony for the prosecution is to be believed, there was in the transaction detailed, much to be reprehended, which need not be further noticed in this court.

Of the other grounds of appeal, the first objects to the exclusion of evidence, which was offered to show a title in the defendant, Lovit Goodyear, to the land; which is described in the deed alleged to have been extorted. It will be observed, that the defendants made no offer to show any previous conveyance from the prosecutor, John D. Morris, to Lovit Goodyear, and they had, from the prosecutor himself, evidence that Lovit Goodyear had bought the land and was in possession of part of it, and from other witnesses testimony given without objection, that his claim to it was well known, and his title considered good. It was a paper title in Lovit Goodyear, which the defendants desired to show, and which was excluded. They urge that such title might have been one circumstance to disprove the fraudulent purpose imputed to them in the use of the peace warrant. Why should a deed have been extorted, say they, when the grantee in the deed already had title? It might be answered, why should a deed from John D. Morris have been taken at all, if the grantee already had title? A deed was taken—something for it was paid, or at least promised,—and it was produced by one of the defendants on the trial. It is manifest that the possession, rather than the title, was the bone of contention before the peace warrant was taken. The same views of interest which led Lovit Goodyear to demand posses-

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sion from the prosecutor in the morning, might have prompted a wish to procure a surrender of all the prosecutor's claims in the evening; the same advantages which were proposed to themselves in taking the deed, might have tempted those who took it, to acquire it unfairly; the same hope of acquiring exclusive possession by cheap and speedy means, which would have moved a claimant, whose title was doubtful, to obtain a conveyance from a squatter in possession, might have moved a true owner to the same course. The circumstance, which the defendant's think might have been made to appear by the testimony which was excluded, was then at best of a very equivocal kind, and for their purpose it was as well shown by the parol statements which were given in evidence, as it would have been by any chain of title. Matters wholly collateral, and especially those which are so remotely relevant to the issue as the title of Lovit Goodyear was here, may be shown by evidence which would be insufficient to establish them, if they were directly in question. A full examination of a title to land, distinguished from the possession, would employ a Court of Sessions in a very unusual, and perhaps very tedious inquiry; would be inconclusive, if all persons having interest in the examination would aid in making it, and would probably be defective for want of some of these persons. It ought not to be entered upon without manifest necessity, and there was not such necessity here.

The second and third grounds of appeal are sufficiently answered in the report. The opinions expressed by the Circuit Judge to the jury, were well warranted by the cases which have been cited at the bar, and have the sanction of this Court.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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J. FOSTER MARSHALL AND SAMUEL FAIR vs. STERLING W. RIVES.

Testator bequeathed certain slaves to his grandson J. R. "for and during the term of his natural life, and, after his death, to the heirs of his body lawfully begotten, or to such person or persons as he, by will, after he comes of age, shall devise and bequeath them to: But if my said grandson shall die before having lawful issue, or before making a legal disposition by will of the said negroes, then and in either of such cases, the said negroes and their increase shall return and become part of my estate, and be equally divided amongst my heirs agreeably to the statute of distributions of force in this State:"—*Held*, that J. R. took an absolute estate defeasible upon the happening of the contingencies mentioned; and he having died of full age, before having lawful issue and intestate, his interest was determined.

BEFORE WHITNER, J., AT RICHLAND, FALL TERM, 1854.

The facts of this case are fully stated in the opinion delivered in the Court of Appeals. A special verdict was found, and his Honor, the presiding Judge, ordered the *postea* to be delivered to the plaintiffs.

The defendant appealed.

Bellinger, for the motion, cited *Powell vs. Brown*, 1 Bail. 100; *Templeton vs. Walker*, 3 Rich. Eq. 543; *Nix vs. Ray*, 6 Rich. 423; 4 Stat. 102; 6 Stat. 209; Chev. Eq. 33; 1 Sug. on Pow. 274; 2 Ib. 137; *Hay vs. Hay*, 4 Rich. Eq. 378; 7 T. R. 322; 1 Chit. Eq. Dig. 663; Lew. on Perp. 333; 1 Jarm. on Wills, 267; *Ward vs. Waller*, 2 Sp. 786; *Allen vs. Fogler*, 6 Rich. 54; *Odom vs. Davis*, 7 Rich. 536; *Pulliam vs. Bird*, 2 Strob. Eq. 134; 4 T. R. 441; 2 Sug. on Pow. 5.

Arthur, contra, cited *Henry vs. Felder*, 2 McC. Ch. 323; *Myers vs. Pickett*, 1 Hill. Ch. 35; 4 Kent, 228; 2 Atk. 307;

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1 Ves. 133; *Cox vs. Buck*, 5 Rich. 604; *Carr vs. Porter*, 1 McC. Ch. 60; 12 East, 253; 9 Ves. 197; *Guery vs. Vernon*, 1 Nott & McC. 69; 16 Johns. R. 537; 5 Mass. 500; 4 T. R. 441; 4 Kent, 204; 10 Ves. 307; *Forth vs. Chapman*, 1 P. Wms. 667; *Henry vs. Means*, 2 Hill, 328; *Lowry vs. O'Bryan*, 4 Rich. 262; *Jackson vs. Noble*, 2 Keene, 590; 2 Chit. Bl. 174; 2 Bl. Com. 171.

The opinion of the Court was delivered by

GLOVER, J. This was an action of trover to recover damages for the conversion of a slave named Peter.

A special verdict was rendered, which found, that Timothy Rives, who died in 1821, left of force a last will and testament, by which he bequeathed certain negro slaves, with their increase, to his grandson, James Turner Rives, "for and during the term of his natural life, and after his death, to the heirs of his body lawfully begotten, or to such person or persons, as he, by will, after he comes of age, shall devise and bequeath them to: But if my said grandson shall die before having lawful issue, or before making a legal disposition by will of the said negroes, then and in either of such cases, the said negroes and their increase shall return and become part of my estate, and be equally divided amongst my heirs, agreeably to the statute of distributions of force in this State."

James Turner Rives attained to his majority in 1824, and died in 1851, before having lawful issue and without having made a legal disposition of said negroes by will. In 1836, he mortgaged Peter (who was the issue of one of the slaves bequeathed in the will) to Townsend, Dickinson & Company, and, in the same year, conveyed him absolutely to James T. Wade.

In 1837, Peter was sold by the direction of Wade to pay the debts due by James Turner Rives to Dickinson & Wade. At this sale, Jesse de Bruhl purchased Peter, and continued in

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possession of him till January, 1853, when he gave him, with others, in trust for the wives of the plaintiffs. In the same year Peter came into the possession of the defendant, who is a son of Timothy Rives, the testator, and a distributee, with others, of his estate. The value of Peter was ascertained to be one thousand dollars, and his hire, per month, twenty dollars for fifteen months.

These were the facts found by the jury and submitted to the presiding Judge, who ordered, *pro forma*, that the *postea* be delivered to the plaintiffs. From this order the defendant appeals, and submits, that the executory bequest to the distributees of Timothy Rives, took effect on the death of James Turner Rives.

The rights of the parties depend on the interest which James Turner Rives, the grandson, took under the clauses of the will recited in the special verdict.

The direct bequest to James Turner Rives is expressly limited to his life; but the superadded words, "after his death to the heirs of his body lawfully begotten, or to such person or persons as he, by will after he comes of age, shall devise and bequeath them to," give him the absolute interest. The court is bound, in ascertaining the intention, to a technical sense of the words "heirs of the body;" for as chattels cannot be entailed an absolute interest must vest in the legatee, or the intention of the testator to confer a benefit on the heirs will be defeated. Nor will the words "to such person or persons as he by will, after he comes of age, shall devise or bequeath them to," prevent the vesting of the absolute interest in the first-taker; not only because there is no limitation over in default of appointment; but because these words can mean no more than "to be at his disposal," and the gift over would be void and the legacy absolute. *Ross vs. Ross*, (1 Jac. & W. 154.)

Unless the executory bequest may be supported by other words which restrict the interpretation of those used in the

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direct gift, an absolute interest vested in the grandson, discharged of the condition; but as the bounty of a testator may be defeated by a technical construction, the court often relies upon trifling circumstances to support the intention.

After the direct gift the testator provides, that if his grandson shall die "before having lawful issue, or before making a legal disposition by will of the said negroes," then they are to be equally divided among his heirs agreeably to the Statute of distributions. The legal effect of the direct gift is to vest the interest in these negroes absolutely in the grandson, defeasible on the happening of these contingencies. In the language of the Vice-Chancellor in *Stone vs. Maule*, (2 Sim. 490,) "the question is not what is the effect of words creating an estate-tail, but of words making a gift over." Even the words "without issue," have been construed in a restricted sense, *Maberley vs. Strode*, (3 Ves. 450,) to support the remainder over. But the words used by the testator neither import a dying without issue nor without having issue. "Before having issue," means never having had issue, and does not import an indefinite succession of issue. Such words limit the failure of issue to the death of the grandson, and indicate a contingency which must happen within the compass of his life; and on his death, without ever having had issue, the executory bequest over took effect, unless the superadded words, "or before making a legal disposition by will," shall vary this construction.

Where a bequest is absolute with no other condition, than that if the legatee die without having disposed of it by will, it shall go over, the condition is repugnant and the legacy vests, discharged of the condition; but the words "before having issue" provide another condition on which the interest was to be defeasible, and whether they be regarded as alternative or double contingencies, both have happened, and the failure to make a disposition by will, being a repugnant and void condi-

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tion, will not defeat a remainder which took effect on the death of the grandson "before having issue."

This construction carries out the intention of the testator, which was to give his grandson an interest in the slaves, defeasible on the contingencies which have happened, in favor of his statutory heirs.

It does not appear to the court, that the statute of limitations can avail the appellees. The remainder men could assert no legal right nor bring an action until the death of the grandson, James Turner Rives, which happened within the time of the statutory bar.

The motion is therefore granted, and it is ordered, that the *postea* be delivered to the defendant.

Motion granted.

O'NEALL, WARDLAW, WITHERS and WHITNER, JJ., concurred.

Motion granted.

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C. & W. J. PEEPLES, EXORS, vs. ELMIRA SMITH AND OTHERS.

Though the circuit judge improperly admitted evidence of the good character of the plaintiffs, a new trial was refused, because the evidence could have had no effect on the verdict.

An appeal from the ordinary upon a question of admitting a will to probate, must be tried *de novo*, and the appellants may take grounds not taken before the ordinary.

After the jury had been fully instructed, the circuit judge was asked to give further instructions upon questions of fact, which he declined to do. New trial refused.

Where it is competent to give a conversation in evidence, the testimony of a by-stander who overheard it, is not secondary evidence. It is not necessary to call a witness who was engaged in the conversation.

Where the objection to the probate of a will is, that it had been revoked by writing, the jury in finding a verdict establishing the will may also find "against the revocation."

BEFORE O'NEAL, J. AT UNION, EXTRA, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows,

"This was an appeal from the decision of the Ordinary, refusing to admit to probate the will of George L. Smith, dated 23d of March, 1854, on the ground, that it was revoked, by a writing dated 13th April, 1854, signed by the testator, in the presence of three credible witnesses, who in his-presence duly subscribed the same.

"The grounds set out in the suggestion of the executors, the appellants, were, 1st, that the will was duly executed by the testator and was valid; 2d, that the paper set up as a revocation was void, on account that the said George L. Smith had not sufficient capacity to execute the same; 3d, that it was procured to be executed by Dr. Harriss, the attending physician on the deceased, and others, by undue influence; 4th, that the same was procured by fraud and imposition generally.

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The appellees pleaded that the will was obtained by undue influence of the executors, and also of a negro woman, Nance, and that they, and more particularly the negro, prevented the revocation by burning, and generally traversed the grounds assumed by the appellants. Issue was joined.

"I state the grounds of the pleas of the appellees, as I gathered them from their being read to me: and I may not, therefore, state them literally, and the appellees, can, if they desire, bring up copies.

"It is difficult to report the case under the twenty-one grounds of appeals, most of which are mere garbled or supposed extracts from my comments on the facts. Such grounds are, I know, utterly unavailable; still I do not like to have it supposed that absurdities, such as are therein imputed to me, ever occurred. I, hence, shall have to state the case more at length than I desired.

"To avoid stating a mass of testimony, which will be of no avail, I will endeavor to state concisely the case as brought out by the proof.

"The will was executed on the 23d of March, 1854, in the presence of McKisick, the clerk, J. B. Young, and Dr. Harriss, all of whom concurred in saying that the testator was of sound mind. This was not questioned by the appellees. It was prepared by McKisick, from a draft written by W. J. Peeples; the testator declared it, the will, as executed, was his will for the last twenty or twenty-two years.

"The testator was a very aged man, eighty-three or eighty-four years old; he had been sick for some time. The executors, the Peeples, his grandsons, children of a deceased daughter, lived in Georgia; they were lawyers. The will gave to them, their sister and another brother, the whole of his estate. There were three other children of their mother not mentioned in it. So the children of John Smith, George Smith, and of Isaac Smith, deceased children of the testator, were not provided for. He had no children surviving him. His reasons

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for not giving to the other grand-children, were stated by different witnesses, as follows: Elmira Smith, the only daughter and child of Isaac Smith, he had provided for in 1846, in a will nearly identical with the present, except as to the provision for Elmira, and for his wife, who had since died, he stated that she had an illegitimate child by her step-father, and therefore, he not only refused to give her anything, but also refused to permit her to come and see him. George Smith, he said, had shot at him, and beat him, and John Smith he had helped by assisting him to pay for a negro, and that he had not treated him well.

"On Thursday, 13th April, he executed the revocation in the presence of Dr. Harriss, Messrs. Spencer and Phillips, all of whom concurred in saying that he was then of sound mind; though Dr. Harriss stated he "did not know whether the testator understood the revocation." This was read to me as Dr. Harriss' testimony, before the Ordinary: (he was not present at the trial.) There was nothing said about the testator not understanding the words "chose in action, used in the revocation. Spencer and Philips both said they would not have made a trade with him *at that time*; and Spencer said he was not able to do common business. He died on Sunday night, the 16th of April. His situation, as described by his nearest neighbor, Mrs. Young, was that he was unable to lift his head from the pillow; that he had to be fed with a spoon; that he was clearly out of his senses on Wednesday evening—pretty much so on Thursday and Saturday evenings, though not so bad.

"The will did not meet with Dr. Harriss' approbation. He told the deceased, the December before its execution, if his grandfather was to make such a will he would disown him. The testator said his grand-children had already done that. In reply to Mr. John B. Young's observation, that he thought the testator was about to break the will, Dr. Harriss said "any one who would make such a will ought to go to hell."

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“After the will was executed, McKisick took it home and sealed it up. The testator asked Harriss to get it and bring it to him, which he did; he gave it to him, and he gave it to Nance, his usual house-servant and favorite, and directed her to put it away. On Saturday evening before the revocation, he wished the will, as he said, to burn it; he sent for Nance, before she had time to come, he dispatched another messenger, and finally, Dr. Harriss. She said when she came, she had burnt it; he said that was a lie, he had given no such orders. He was then suffering great agony from his eye, which had burst; he was cursing and swearing; he ordered her whipped. Mr. Young gave her a few stripes; his negroes, at his request, were all called in; when they came in he did not even notice them. On Monday morning, Dr. Harriss severely whipped Nance to make her produce the will; she averred that she had burnt it. He, Dr. Harriss, searched the trunk, in a chest at the head of the testator's bed, for the will, it was not found, though it was stated both by Harriss and Young, that the search was slight. W. J. Peeples arrived the evening of the day on the night of which the testator died. The keys of the chest and trunk were surrendered to him. The next evening, after the burial, he returned alone to the house for a few minutes. The next morning, examining the papers of the deceased, he found at the very bottom of the trunk, the will, in the leg of an *old sock*. Dr. Harriss procured Mr. Arthur to write the revocation the day of the execution; the testator asked him if he had the paper; he said he had left it home—if he wished to execute it in the presence of witnesses he would go for it. The testator said he did. Testator inquired who should be the witnesses; after some talk, the Doctor suggested Mr. Spencer and Mr. Phillips—they each lived a mile and a half off, but they were not intimate friends and associates of the deceased. They were sent for by the testator; before they came, and while Dr. Harriss was there waiting for them, John B. Young, a witness to the will, and John Humphries, the tes-

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tator's step-son-in-law, were present. Nothing was said to them about the revocation. When the witnesses came, Dr. Harriss suggested that he was in a hurry, (he had been there an hour and a half,) told the testator to state his reasons; he accordingly said he had become dissatisfied with his will, he desired to make his grand-children equal; the law made a better will than he could make. Harriss asked if he should read the paper. "He might read it if he chose;" "he did not care much about it," was the testator's reply. The testator asked Mr. Spencer to take care of it until he called for it. The day of the burial of the deceased, [Monday,] Dr. Harris called on Spencer, desired him to bring the revocation to Union, where he would meet him. This was done, and Harriss inquired of a lawyer what he should do with it.

Dr. Gage was requested by one of the executors, Cincinatus Peeples, to attend to his grand father; he accordingly did. He saw him 19th, 21st, 23d March, in company with Dr. Harriss; he was again to meet Dr. Harriss on the 26th; the latter did not attend. They agreed on the 23d, if deceased got worse [he was then apparently better] Dr. Harriss was to let Dr. Gage know. He, however, gave no such information. There was a great deal of proof as to testator's situation and capacity from the 23d of March to his death; there was no doubt that he was often in the exercise of his proper senses; it was also plain from the testimony, that he was also often in a very doubtful state. He continued to inquire impatiently for his grand-son and his executors until his death; he said, on one occasion in the presence of Dr. Harriss, that if they were to receive a letter giving an account of his death, they would be soon there, to which Dr. Harriss replied, "Yes."

"To Mrs. Frances Myers on Tuesday before the revocation, he stated how his will was: [he stated the exact provisions,] he told her this had been his will for twenty years. They were trying, he said, to get him to make another will; if they

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did, he wanted her to see it blown to the clouds, he was not, he said, to be led by the nose.

“On Sunday morning preceding his death, John C. Young stated he found the testator quarrelling with his woman, Harriet; he wanted her to go to Dr. Harriss’ for a paper; he said he was afraid he would not treat him right about it; she did not go; another, Mary, promised to go that evening; he seemed to be satisfied. Mary Jane Trammel proved, that on the same day, the deceased applied to her sister, Wealthy Trammel, and asked her “if she would go to Dr. Harriss’ and get a paper, which they brought there for him to sign; he was dying, and wanted to destroy it before he died, for he had made his will, which he intended to be his will.’ Her sister, Wealthy Trammel, was in court; the appellants did not examine her.

“Col. B. Johnson, as well as other witnesses, states the character of the appellants to be good. He said he saw *them* when in Georgia, sometime ago, and they asked him to invite the deceased for them to come to Georgia, and let them take care of him. He delivered the message; the deceased said they were sharpers, and smart men, and he did not intend they should have his property in his lifetime. Dr. Harriss was proved to be a man of good character.

“I have stated the case generally, and as particularly as seems to be necessary. I will now, however, look to the grounds of appeal, and if anything is omitted, supply it.

“It is true I admitted evidence of the general good character of the appellants; they were charged as being guilty of a fraud in procuring the will to be executed; and one of them, W. J. Peeples, particularly, in slipping the will into the trunk, after the testator’s death. It therefore seemed to me, according to the rule, their characters were in issue, when they were charged with a fraud. The testimony, however, as the case turned out, was wholly unimportant, for there was not a *tittle* of proof to charge them with fraud in procuring the will.

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"I did hold, that the appellants might, by their appeal, make the question whether the testator was of sound mind at the execution of the alleged revocation. That it was, in this point of view, perfectly immaterial, whether they made the question before the Ordinary or not. The grounds of appeal filed with the ordinary, corresponded, however, with the suggestion.

"In my charge to the jury, I was *very particular* to tell them, that it was my duty to sum up the facts; if in doing so, they discovered my opinion, it ought to have no influence on them, further than it accorded with their own opinions of the facts. They, not I, were to decide on the evidence. I studiously endeavored, in commenting on the evidence, to give the views of which it was susceptible, in favor of both parties; and I think no one knew what was my opinion of how the case should result. The right to make a will, was, I told the jury, a very sacred right.

"The fourth ground is a perfect absurdity. I admitted evidence to show that the testator was dissatisfied with the revocation, and gave it the effect to show, that it was not the understood, voluntary act of the testator. The same kind of evidence was previously received, at the instance of the appellees against the will, and to show it was properly revoked.

"I submitted to the jury the question of the competency of the testator at the execution of the revocation, and turned the jury's attention to the testimony denying or affirming it.

"The sixth ground is an entire mistake. I made no such remark on Col. Johnson's testimony:" the words "the wanderings of an insane mind," were applied to conversations with other witnesses after the revocation, and not to the conversation with him. I said, I believe, of this conversation with Col. Johnson, that it was probably the result of a cautious, jealous old man, determined to hold the staff, his property, in his own hands till his death.

"In commenting on the manner of the execution of the

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revocation, I said to the jury, that the fact that John B. Young, a near neighbor, a witness to the will, and John Humphries, the testator's step-son-in-law, both of whom were present at the testator's house, while Dr. Harriss was waiting to have the revocation executed, were not called as witnesses, and that Spencer and Phillips, who were comparative strangers, were called, might be considered by the jury, and they might infer, that there was therefore something wrong in the revocation. To this I opposed the explanation, that the witnesses, Spencer and Phillips, had been sent for, and the jury were told, this might remove the ground of suspicion.

"In stating the grounds against the revocation, arising out of the alleged improper conduct of Dr. Harriss, I mentioned to the jury the fact, that he did not inform Dr. Gage, that the testator had become worse, as he had promised to do so. I know nothing of his reasons for not doing so; he was examined before the Ordinary, and did not state them. His statements to Dr. Gage, why he did not meet him on the 26th, was objected to as inadmissible, and excluded.

"I gave no such charge as mentioned in the ninth ground. But I supposed, that the will was placed in the trunk, in the old sock, by the woman, Nance, according to the directions of the testator; this I said to the jury. For one of the witnesses proved, that the testator, shortly before his death, inquired about the will, and his servant Jim said to him, it was in the trunk, in the chest, at the head of the bed. The testator seemed to be therewith content. There was no proof that W. J. Peeples ever saw the will, till he found it in the trunk. He went from John B. Young's, after the burial, to the house of the deceased. Mr. Young proposed to go with him; he said it was unnecessary, it was a very short distance; he was going to lock up the house, and would be back in a few minutes. He was not gone half an hour.

"The tenth ground goes a great deal farther than I did. I told the jury, that Dr. Gage's testimony, as to the capacity of

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the testator, was one of the circumstances to which they might refer. I thought there was no ground to reject his testimony; he had seen the deceased the 19th, 21st, 23d, 26th March, and knew his situation; he had heard the description of his condition, when the revocation was executed, and, as a scientific man, might well say he could not have been as competent on the 13th of April as on the 23d March.

“The eleventh ground is another perversion. It is true, I said to the jury, that it was plain Harriss took an active part in the revocation, but the appellees had the full benefit in opposition to it of the facts, that the testator might have directed, and, according to some of the proof, did direct Harriss to obtain it, and that Harriss proved that he had used no influences, and that all which he did was according to the testator's directions. If these were believed, the jury were told there was nothing wrong in Harriss taking an active part.

“The twelfth ground is also another mistake. The testator's reasons for refusing to provide for Elmira, the children of George and John, were stated. The appellees had the full benefit of his after statements, such, as that ‘his little grandchildren were fluttering all around him.’

“The charge to the jury, on the thirteenth ground, was, that if the deceased did not understand the act which he did, it would not bind him. The jury were referred to Dr. Harriss' statement, ‘he did not know whether the testator understood the revocation or not.’ I am not aware of any proof that Harriss referred to the term chose in action.

“The fourteenth and fifteenth grounds can be judged by the proof already reported.

“Upon the sixteenth ground, I have to remark that I had fully charged the jury on every point; they had been permitted to walk out before they retired to their room. Mr. Thomson asked for additional instructions, which I thought very improper under the circumstances. The Court of Appeals will see from the ground how utterly frivolous they were, especially after I

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had passed over and commented fully on the very matters. On the seventeenth ground, I have only to remark, that the jury were to judge, and have decided in that particular.

“The eighteenth ground has surely no pretence to be a legal ground. Between the proof of two living witnesses, was it ever before heard, that the court was to decide which was the best?

“The nineteenth ground is true. I refused to permit the verdict to be amended; the issues were: Was the will valid? Was the revocation legally and properly executed? The Ordinary had decided that the revocation was valid. The verdict, as a matter of course, must decide, whether the revocation was valid or not. It is true, a finding for the will might have done, but when it went further, and found against the revocation, it only made the matter more certain.

“The testimony of Sarah Humphries taken before the Ordinary, mentioned in the 20th ground, was objected to being read by the appellants. They denied any agreement to that effect. She was in the district, and not at court. I could not, under such circumstances, order it read.

“The twenty-first ground is the usual flourish with which an appeal concludes and needs no remark from me. The jury found for the will and against the revocation; and I fully concur in their conclusion.”

The defendants appealed, and now moved this Court for a new trial on the grounds, viz:

1. Because his Honor admitted evidence of the good character of the plaintiffs.

2. Because his Honor held and ruled that the executors, though they had not made any question as to the capacity of the testator at the date of the revocation (April 13, 1854,) on the trial before the Ordinary, which defendants might assume

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as true, still they could do so now, with all the legal advantages they could have, had they done so, in which it is submitted, there is error; inasmuch as this Court has only appellate jurisdiction, and his Honor should have charged that no allegation of incapacity being made before the Ordinary, was a tacit admission of testator's capacity.

3. Because his Honor dwelt at great length upon the sacred right of making a will, (which defendants admit) without advertng to the fact that the execution of the revocation, was the highest exercise of that right.

4. Because his Honor admitted parol evidence to revoke the revocation, and in his charge gave full effect to that evidence.

5. Because his Honor charged the jury that they might well conclude the testator incompetent at the date of the revocation, when the proof was that he was competent down to the day of his death, as proved by plaintiff's witnesses and others.

6. Because his Honor charged that the testator's conversation with B. Johnson, in 1852, might well be regarded as the "wanderings of an insane mind," though made at a period when there was no charge or pretence of incapacity.

7. Because his Honor charged that the jury might well infer there was something wrong in the revocation, because the Youngs were not called as witnesses, and that Spenser and Phillips were comparative strangers to testator; when the proof was otherwise, and that the Youngs were not present, and Spenser and Phillips were sent for by testator, they being near neighbors.

8. Because his Honor charged that Harriss having failed to meet Dr. Gage at testator's, by appointment, when he had in

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fact met him twice, and was prevented from meeting him the third time by professional engagements, as Harriss informed Gage, which his Honor would not permit the witness to tell; in all which it is submitted there is error.

9. Because his Honor charged that the testator might well have put the will in the trunk, when the proof showed he could not have done so; and, in fact, it must have been put there by W. J. Peeples after testator's death, as appears by the evidence.

10. Because his Honor charged that Dr. Gage's opinion of the capacity of testator, on the 13th April, was important testimony; when the fact was, Gage had not seen testator after the 26th March, and his opinion was incompetent evidence, which was objected to.

11. Because his Honor said to the jury "he had no doubt Harriss took an active part in the revocation," when Harriss swore he had not used any influence, and had done nothing but what he was requested to do by testator, and there was no proof to the contrary.

12. Because his Honor charged the jury that the testator was angry with his children till his death; when the proof was that he became reconciled, and said "he could not punish the children for the acts of the parents;" and was even reconciled to Nance.

13. Because his Honor charged—that because Dr. Harriss said "he did not know whether testator understood the revocation or not," the jury might infer that testator was incompetent, when the proof was that Harris referred to the term "choses in action," and that the legal presumption and proof was that testator *did* understand the legal effect of the paper.

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14. Because the will of the 23d March was obtained by flattery, importunity, and undue influence, and was in fact and in law revoked prior to the 13th April, 1854, by being fraudulently kept out of testator's possession, contrary to his will and wishes, often expressed, as he clearly desired to destroy the same.

15. Because the revocation of the 13th April, 1854, was duly and legally executed by a competent testator, and could not be revoked by parol.

16. Because his Honor refused, when requested by defendant's counsel, to hear suggestions as to points on which they wished the jury to be instructed, and which had not been adverted to in the charge; among others, they wished him to instruct the jury that if Harriss meant by saying, "he did not know whether testator understood the revocation or not," that testator did not understand the term "choses in action," but knew the legal effect of the paper, then it did not affect the validity of the revocation; and also as to the sacred right of making wills.

17. Because Dr. Harriss had done nothing that was legally improper, or that could affect the validity of his testimony.

18. Because his Honor admitted the testimony of Mary Jane Trammel, as to the conversation between Wealthy Trammel and testator, which was secondary evidence—Wealthy Trammel being in Court.

19. Because his Honor refused to allow the verdict to be amended by striking out the words "and against the revocation," inasmuch as that paper had not been propounded for probate, and had only been used as evidence.

20. Because his Honor refused to allow the testimony of

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Sarah Humphries, as taken before the Ordinary, to be read as defendant's counsel understood it was to be read.

21. Because the verdict was contrary to law and evidence, and should be set aside.

Arthur, Thomson, for the motion.

Dawkins, Herndon, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case, I propose to examine in a very summary way, such of the grounds as present any legal question. On the first ground it may be remarked, that a majority of the Court think that the admission of proof of the appellants' good character does not come within the exception pointed out in *Dawkins vs. Gault*, 5 Rich. 151. But as in *Smets vs. Plunkett*, 1 Strob. 372, we all agree that it would not have had any effect on the verdict, and, in this point of view, it would be extreme fastidiousness to order a new trial for such an error.

The second ground of appeal presents no difficulty. For the appellants had the right to make any grounds which they pleased, to test the decision of the Ordinary. When such grounds were filed with the Ordinary, and the suggestion to the Court of Common Pleas, corresponding therewith, presented to the appellees the issues, in fact, on the same, and they pleaded thereto, I do not perceive how it can be disputed, that according to the Act of 1889, the case should be tried *anew*. That is, as I understand, it is tried *as a new case*.

But in point of fact, the Ordinary did decide on the very question now made the subject of dispute. For he had to decide before he could give effect to the paper called a revocation, that the testator was of sane mind; and it is perfectly

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immaterial, therefore, even if the case now was a strict appeal from his decision, whether the appellants made, on the hearing before him, *that* as a distinct objection or not.

The fourth ground when explained, as it is by the report, requires very little comment *here*. Beyond all doubt, a will, or a writing revoking a will, cannot be legally revoked by parol proof. But that was not the purpose for which the evidence was given. It was offered, and received, to show that the revocation was not the free, voluntary, understood act of the testator. When so understood, there can be no room to dispute the competency of the proof.

The 3d, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th 15th, 17th, 20th, and 21st grounds require nothing further to be said of them, than that they are exceptions to the Judge's remarks on the facts, as he submitted them to the jury, and were either mistakes of the counsel who drew them, or were so separated from the context of the charge as to give them an improper impression. When explained, as they are by the report, they require no further vindication.

The 16th ground claims a right, which, when properly presented, would never be denied. If the attorney for the appellees, who made this claim on the circuit, had, before the charge commenced, asked for specific instructions on particular points of law, then, if they had not been given, and there were any such legal questions properly to be decided, and the appellees suffered any injury from the instructions not being given, it would be a ground for a new trial. But after a Judge has passed over the entire case, and the jury are in the act of retiring, I am far from believing that an attorney, who may not like the remarks of the Judge upon *the facts*, has the right to ask for further instructions. It is worthy of remark *here*, that this case goes even beyond *that*. For the jury had not only been fully instructed, but had been permitted, before retiring to their room, to leave the court room; it was on their return, that these additional instructions on mere differ-

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ence of views as to facts were asked. It was, as the Judge supposed, then too late to ask for any such thing. This was, however, an appeal to the discretion of the Judge below; that it was exercised properly this Court does not doubt.

The 18th ground is a strange mistake as to law. Two living witnesses hear the same words uttered by a man: one is called and sworn, and the party chooses to rest on that, and not call the other; there can be no doubt that there is no question about the competency of the testimony thus given. If the words were uttered to the one not sworn, it does not affect legally the testimony of the other. It may be a matter affecting the credit which the jury may give to the proof. But between the witnesses there is no such distinction as "*the best and next best.*"

On the 19th ground, I have only to say, that there must be some strange misunderstanding of the issues before the Ordinary and this Court, on the part of the learned counsel for the appeal to this Court. The revocation was as much propounded for probate to the Ordinary, as the will. It is true, it was set up to defeat the will: but to have that effect, it was necessary it should be proved, and allowed. It was accordingly both proved to the satisfaction of the Ordinary, and also allowed by him. The appeal from his decision made it a part of the issue before the Court. It was, therefore, in every respect, proper that the jury, in establishing the will, should find against the revocation. We are therefore of opinion that the verdict required no amendment.

The motion is dismissed.

WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

WITHERS, J., absent from sickness in his family.

Motion dismissed.

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Hewitson vs. Hunt.

ANNA D. HEWITSON vs. ALFRED M. HUNT, CHARLES NEUFFER, and JOSEPH D. DALY.

The action of replevin is, in this State, confined to cases of wrongful distress. Plaintiff had issued a writ of replevin against the sheriff, for wrongfully taking her goods, under an execution against a third person. The circuit judge quashed the writ, and on appeal his decision was sustained:—*Held*, that the sheriff could not be attached for a contempt, for proceeding to sell the goods under the execution, pending the appeal.

BEFORE WHITNER, J., AT RICHLAND, FALL TERM, 1854.

Neuffer, one of the defendants, Sheriff of Richland district, had levied two executions in his office in favor of A. M. Hunt, and Joseph D. Daly, on certain property, consisting mainly of household furniture; and having the same in his possession, the plaintiff procured to be issued a writ of replevin, whereby the sheriff was required to surrender the property. The defendants moved, on the first day of the term, that the writ be quashed, and the chattels restored to the sheriff. His Honor granted the motion, and on the same day the plaintiff gave notice of appeal on the following grounds:

1. Because it was erroneous to quash such writ on mere motion—the question being properly triable in the action of replevin.
2. That the writ of replevin was regularly and properly issued; and having been duly executed, ought not to have been quashed.
3. Because the decision was contrary to law.

On the next day the sheriff was proceeding to sell the pro-

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perty under the execution, and thereupon the plaintiff moved for the following order.

On motion of Bellinger & Maher, plaintiff's attorneys, it is ordered that a rule do issue against the defendants, requiring them to show cause forthwith, why they should not be attached for contempt:

1st. In this: that they are attempting to carry out and enforce the circuit decision, ordering the writ of replevin, issued in the above case, to be quashed, notwithstanding notice of appeal from said decision was duly given, and said appeal is regularly pending.

2d. In this: that they, the said defendants, are attempting to recapture under a *fi. fa.*, goods and chattels regularly replevied by the process of this court, the said process being still of force by virtue of the appeal from the circuit decision ordering the same to be quashed.

His Honor refused the motion. The plaintiff appealed, giving notice that she would move the Court of Appeals for the following orders:

1st. To reverse the order quashing the writ of replevin.

2d. To require the defendants forthwith to re-deliver the goods and chattels replevied; and in default thereof, to show cause on the first day of the next Term of the Court of Common Pleas for Richland district, why they should not be attached for contempt.

3d. To require the defendants to show cause, on the first day of the next Term of the said Court for Richland district, why they should not be attached for contempt, for attempting to proceed while a notice of appeal was pending.

The appeal was now heard.

Bellinger, for the motion.

De Saussure, contra.

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The opinion of the Court was delivered by

WHITNER, J. The argument in support of the present motion has taken a wide range, and involves an inquiry into the general doctrine of replevin. However imposing the array of authorities, they are not without conflict.

The order on circuit to quash this writ, was made on the assumption that replevin does not lie in this State, unless grounded on a wrongful distress, or founded on some express statute; the right to maintain this suit is rested on the common law, being an ordinary case of levy by a sheriff on certain goods alleged to be the property of the defendant in execution, and now claimed by this plaintiff.

The judicial annals of this State furnish no precedent of a successful prosecution of this action, except in contesting the validity of a distress. Every attempt otherwise to use this form of remedy, as far as known, has stranded at the threshold; the indisposition in our courts to sustain such actions is very manifest; the general objection now raised, has been heretofore raised as frequently as such cases have been presented, the point however, not yet having been distinctly ruled. No one can doubt that instances have often occurred in which such actions would have been brought, were it not for the general conviction that they could not be maintained; a vigilant bar, suggestive of expedients to meet the ever varying wants of society would otherwise long since have disinterred this alleged ancient remedy. But the books and records are searched in vain, and the oldest judges and lawyers are at fault for a single case on circuit, or in the Court of Appeals, and it may well be insisted that a negative usage beyond the memory of man, carries with it much force in the question now under consideration. If in fact such actions were ever in use after a disuse of nearly a century, certainly opposition to a revival would derive strength from a just apprehension that much confusion would inevitably ensue; other commensurate remedies, of common resort, favored and enlarged by legislation, and well defined

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by a long course of adjudication, exist in this State for the whole class of injuries for which this action is now claimed as an appropriate remedy ; before the present motion can find favor, the right must be clear, and the necessity palpable.

The reported cases of *Byrd vs. O'Hanlin*, 1 Mill, 401; *Gist v. Cole*, 2 M'C. 456; and *Lynch vs. Coms. of Roads*, Harp. 386, from thirty to thirty-five years ago, and followed as they were, not long after, with legislation in reference to the action of trover, and extension of the powers of commissioners and masters in equity, in granting injunctions, taken in connection with the relief afforded in chancery in the recovery of chattels in specie, are all significant of professional views on this subject. To my own mind, the Act of Assembly of 1808, would be a strange jargon, if such actions as the present were maintainable. In its different sections, the Act undertakes to provide for "all cases of replevin" as to the writ, declaration, and bond, and whilst this plaintiff has sought to conform, the condition of her bond to "return the goods and chattels in case a return thereof shall be awarded; then this obligation to be null and void" is widely different in its terms and guarantees from the bond required by the Act. It is no sufficient answer, that in the present case the bond cannot conform, for by fair implication this denotes that replevin is not allowable in other cases than those contemplated by this Act, being such only as arise out of proceedings for rent.

I think the case might well rest upon these views, but we are solemnly admonished that a denial of this form of proceeding for such injuries as the present, will in fact amount to a *virtual repeal* of the common law. Such an admonition perhaps would have been more startling a half century or more ago, for I confess that the maintainance of such suits would rather look like an innovation on long settled usages, to say nothing of judicial legislation, whereby an antiquated and doubtful form of proceeding would be introduced.

In this inquiry, we have been pointed to many of our sister

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States where such forms exist, whilst in others they are not to be found. In fact, however, but little aid is derived from these sources. Legislative enactments have served to extend and perpetuate in some of them, and to restrain and extinguish in others, such proceedings as we have now under investigation. But in searching for views entertained on this subject years ago, I was particularly struck with the remark of the President of the Court in Pennsylvania, as far back as 1785, that "in England, most cases of replevin are founded on distress for rent; and that it was even said in some of the books, that *it would lie in no other.*" 1 Dal. 156.

Distress and replevin have stood in intimate connection from feudal times until this day. Distress, it is to be remembered, is itself not an action, but a remedy—summary in its nature, and extraordinary in its character—a process whereby a personal chattel is taken from the possession of one to secure satisfaction for a demand; formerly remaining in the hands of the distrainor as a pledge to compel performance; now from the first taking in the custody of the law. Hence the appropriateness of replevin, a summary proceeding in turn, whereby, upon proper security, *the pledge* is re-delivered, the question of right to be subsequently determined. Originally, doubtless, the one proceeding suggested the other; there is reason in regarding them inseparable.

Whatever may be the practice which has obtained in other States, especially wherein legislation has been had on the subject, still there is no difficulty in tracing the origin of a different practice here, which may well be regarded as having matured into a principle. The disuse or denial of this remedy, except as a consequence of proceeding in distress, is neither the result of accident nor of oversight, much less of ignorance of the common law.

Very nearly a century since, the distinguished Vinerian Professor in the University of Oxford, whose able exposition of the law has certainly given him high rank among modern writers,

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laid down the doctrine I am called to vindicate. Blackstone's Commentaries, certainly for more than fifty years in this State, has been a text-book for the student, and a safe guide for the jurist. Treating of injuries to personal property, and appropriate remedies, he enumerates *replevin* as an institution ascribed to Glanvil, and says, "it obtains only in *one* instance of unlawful taking, *that of wrongful distress*." 3 Black. 146. This definition is condemned as being too *narrow*, and in a note to Wendell's edition, the authorities will be found collected.

Chitty, in 1 Vol. Plead., though regarding the action as "*principally* used in cases of distress," adds "that *it seems* it may be brought in any case, where the owner has goods taken from him by another;" this in turn has been condemned as entirely *too broad*.

It would be endless to cite the different elementary writers, and their various definitions. The profession will find authority without stint in this book making age resting on adjudged cases of recent date, and variously growing out of legislative enactments, or particular usages said to have obtained in certain jurisdictions. But it is not easy to perceive authority for such discrepancies founded on old cases or writers. Gilbert's Treatise on Distress and Replevin, will be found very fully to indorse the doctrine for which I contend.

Sellon tells us that "*replevin is a remedy grounded upon a distress, for goods are only replevisable when they have been taken by way of distress*." 2 Sel. 153.

Replevin is a re-delivery to the owner, of his cattle or goods *distraigned* upon any cause, upon surety, &c., 8 Bac. Abr. Rep. A. Co. Litt. 145, b. says, "It is a re-deliverance of the goods or cattle *distraigned*, to the first possessor."

Such authorities well account for the usage which has obtained in this State in confining practically the writ in replevin to cases of *wrongful distress*, and though at this day it had been shown to have originated in a mistaken policy, or miscon-

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ception of the principles of the common law, has become too inveterate and well settled to be now called in question.

The motion to reverse the order made on circuit is dismissed.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Upon the motion against the sheriff for a rule to show cause, the opinion of the Court was also delivered by

WHITNER, J. The order quashing the plaintiff's writ of replevin, being sustained by the Court of Appeals, the plaintiff's motion for an attachment against Sheriff Neuffer, for proceeding with certain executions in his hands, notwithstanding an appeal by plaintiff, must fall with the writ.

Whatever may have been the peril incurred by the sheriff, if a different result had been attained, or whether this proceeding, even in such event, would have been entertained, it is not now necessary to discuss.

The motion for a rule to show cause, &c., is dismissed.

O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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EXORS. OF DAVID R. EVANS vs. A. W. YONGUE.

To an action of debt on bond given for the price of a tract of land, a defence of partial failure of consideration because of a deficiency in quantity, is not subject to the plea of the statute of limitations.

BEFORE O'NEALL, J., AT FAIRFIELD, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“This was an action of debt on a bond executed in 1836.

“It was given for part of the price of a tract of land, supposed to contain 1802 acres, sold by the deceased to the defendant at \$10 per acre.

“The deed of the deceased describes the land as 1802 acres, and refers to a plat, which so represents it. The deed was executed in 1836, and contains the usual clauses of warranty. By a re-survey in 1854, it was found there were mistakes in the measurement of the lines, and thereby there was a deficiency of 55 acres.

“The defendant pleaded this in discount to the action on the bond, recently brought.

“I thought the Statute of limitations barred the discount.

“The plaintiff had a verdict.

The defendant appealed and now moved for a new trial, on the grounds :

1. Because it is respectfully submitted, his Honor erred in holding that the defence was barred by the Statute of limitations.

2. Because the verdict was in other respects contrary to law and the evidence.

Boylston, for the motion. The defence goes upon the ground

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of failure of consideration. It is not covenant for breach of warranty. *Bauskett vs. Jones*, 2 Sp. 68; *Abercrombie vs. Owings*, 2 Rich. 130; *Ellis vs. Hill*, 6 Rich. 39. The enquiry is into the consideration of the bond—it is not a case of discount. *Morrow vs. Hanson*, 9 Geo. 398; 2 Green. Ev. §113, 136; Ang. on Lim. §75.

M' Cants, contra.

The opinion of the Court was delivered by

GLOVER, J. Until the cases of *King vs. Boston*, (7 East, 481,) and *Cook vs. Rhine*, (1 Bay, 16,) the remedy for a breach of covenant or warranty, both in England and in this State, was a cross action. A more equitable rule has since obtained which is justified by its practical convenience, and a deficiency in quantity or a defect in quality or title, may now be relied upon, either in abatement of the price stipulated or in a rescission of the contract *in toto*.

In this case the defendant showed a partial failure of consideration, and if his defence be a set-off, it is barred by the statute of limitations, and cannot be offered in discount to the plaintiff's cause of action. There are *dicta* which expressly maintain, that a failure of consideration, as matter of defence, is embraced within the terms of our discount law, (*Cook vs. Rhine*) and support the ruling of the circuit Judge.

In one of the earliest cases (*Gray vs. Handkinson*, 1 Bay, 278) the court said, that the jury ought to make such a reasonable abatement as would make the party whole for any injury he might sustain on account of the deficiency or defect. COLCOCK, J., (*Adams vs. Wylie*, 1 N. & McC., 78,) uses this language—such defences are daily admitted by our courts. It may have been originally a departure from the strict rules of a court of law; but from the time of the case of *Gray vs.*

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Handkinson, it has never been disputed. Commenting on the case of *Adams* vs. *Wylie*, O'Neill, J., says, It was not the case of a discount properly so called. (*Johnson* vs. *Wideman*, Rice, 325.) In a late case (*Mondel* vs. *Steel*, 8 Meeson & Wels. Exchq. R., 858) Parke, B., after reviewing the English practice, proceeds: It is competent for the defendant, in all such cases, not to set-off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the contract was worth by reason of the breach of the condition.

The better opinion, therefore, is that a failure of consideration is not a matter of defence within the provisions of the discount law; but analogous to it in character, and is embraced within that species of defence called *recoupment*, (Barb. on Law of Set-off, 26,) the purpose of which is to reduce the plaintiff's damages for the reason, that he himself has not complied with the cross obligations arising under the same contract. It is an equitable defence, superseding the necessity of a cross-action by the defendant, whose plea is, that to the extent of the diminution in value, by reason of the breach of warranty, the contract was void *ab initio*, and by a parity of reason, where there is a total failure of consideration, it may be shown in bar of the action. Such a defence grows out of the contract itself, which is the cause of action, and is not barred by the statute of limitations. It would be manifestly unjust to permit the vendor to enforce a subsisting contract, and deny to the purchaser, from lapse of time, a defence involving the validity of it at its inception.

In cases of cross demands, accruing about the same time, both barred by the statute, and the plaintiff has saved the statute by suit, but the defendant has not, the defendant's discount has nevertheless been allowed: and Lord Kenyon sustaining the set-off, says: It would be the highest injustice to allow one to have an operation by law and not the other. (*Ord*

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vs. *Ruspini*, 2 Esp. R. 569.) It was held in the case of *Morrow vs. Hanson*, (9 Georgia, R. 898) where a total failure of consideration was pleaded, that the plaintiff could not avoid this defence by insisting on the statute of limitations, although more than four years had elapsed from the time of the warranty. A partial failure is within the reason of the rule, and, *pro tanto*, the consideration has failed. If this defence is barred by the statute, the plaintiff will recover the value of fifty-five acres of land, which their intestate never conveyed.

Motion granted.

WARDLAW, WITHERS and WHITNER, JJ., concurred.

Motion granted.

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THE G. & COL. RAILROAD CO. vs. A. J. JOYCE, EX'R.

Defendant was sued as executor. He pleaded *non assumpsit* and the statute of limitations; and at the trial contended, that as he was not rightful executor, but executor *de son tort*, plaintiff was not entitled to nine months, in addition to the four years allowed by the statute of limitations, within which to sue:—*Held*, that defendant was estopped by his pleading from contending that he was not the rightful executor.

BEFORE GLOVER, J., AT GREENVILLE, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“ This was an action of assumpsit, to recover the remaining instalments due on one hundred shares subscribed by the defendant's testator, John H. Joyce, to the stock of the Greenville and Columbia Railroad Company.

“ The general issue and the statute of limitations were pleaded. Only the first instalment had been paid; and, if nine months, within which time executors and administrators are exempt from actions, be added to the statutory bar, the remaining instalments were not barred. The jury was so instructed, and a verdict was rendered for the plaintiff, for all the remaining instalments and interest.”

The defendant appealed, and now moved this Court for a new trial, on the grounds, to wit :

1. Because it is respectfully submitted that his Honor erred in holding that the statute of limitations would not run in favor of an executor *de son tort*.

2. Because, not only the second, but the third, fourth and fifth instalments, sued for by the plaintiffs, were barred by the statute of limitations, and his Honor should have so instructed the jury.

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8. Because the verdict of the jury is contrary to law and evidence, in including in it the third, fourth and fifth instalments, which were barred by the statute of limitations.

Sullivan, for the motion.

Perry, contra.

The opinion of the Court was delivered by

MUNRO, J. When a party obtrudes himself into the office of executor, by a tortious interference with the goods of the deceased owner, although the law stigmatizes such intruder as an executor of his own wrong, he is nevertheless, in suits instituted against him by the creditors of the deceased, uniformly treated as a lawful executor—for, as is said in 2 Blac. Comm. 517, “the obvious conclusion which strangers can form of his conduct, is that he hath a will, in which he is named as executor, but hath not taken probate thereof.”

In this case the action was assumpsit in the usual form, to recover from the defendant, as executor of the deceased, sundry instalments due on shares of stock, subscribed by the latter in his lifetime to the Greenville and Columbia Railroad Company.

The pleas were, the general issue, and the statute of limitations. The only defence to the action was the statute of limitations, and in this was involved the question, whether in the computation of time, the nine months—the period of exemption from suit which is extended by statute to executors, &c.,—should be added to the statutory bar, or not. For the defendant it was urged, that not being the lawful executor of the estate, but merely an executor *de son tort*, the statutory period of exemption did not apply to one occupying this relation; and as the plaintiffs had not been prohibited from bringing their action within the nine months, and had failed to do so, the bar of the statute was complete.

This position was overruled by the Circuit Judge, so that his

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ruling is now charged as error in the defendant's grounds of appeal.

Conceding that the ground in question possesses all the force that is claimed for it, if urged in behalf of one really occupying the tortious character which the defendant here assumes to occupy, it is clear that it cannot avail this defendant; he, at least, is estopped by his own voluntary admission upon the record, from deriving any advantage he might otherwise have derived from it, under a different form of pleading—for having admitted by his manner of pleading, that he was the lawful executor of the estate, he cannot now be permitted to repudiate that character, and to assume another—or rather, he cannot be permitted to occupy towards the estate of the deceased, at one and the same time, the two-fold and incongruous relations, of a lawful executor, and an executor *de son tort*.

Had the defendant been desirous of availing himself of the ground in question, he should have exhibited his real character—if his real character it be—at an earlier stage of the suit. This he might have done, by pleading *ne unques* executor. Under this form of pleading, the question might properly have been made, but having made his election, and having chosen to be treated as a lawful executor, he has now no reason to complain that he has been cut off from a ground of defence, which appertains exclusively to one occupying a position the very opposite to the one he has deliberately selected for himself upon the record.

The motion is dismissed.

WARDLAW, WITHERS and GLOVER, JJ., concurred.

O'NEALL and WHITNER, JJ., being directors, gave no opinion.

Motion dismissed.

Richardson vs. W. and M. R. R. Co.

JOHN S. RICHARDSON, SR. *vs.* WIL. & MAN. R. R. COMPANY.

Case against a railroad company for running over and killing with their train a slave of the plaintiff's, asleep upon the road. Verdict for the defendants, which on appeal the court refused to disturb.

Even if there was negligence on the part of the defendants, the slave, whose act is to be attributed to the owner, being as much to blame as the defendants, no recovery could be had.

The proximate cause of the slave's death being his own voluntary imprudence, the defendants are not liable.

BEFORE WHITNER, J. AT SUMTER, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“ This action was brought by plaintiff to recover damages for a negro boy, the property of plaintiff, killed by the train running the road of the Company, in the day time, the latter part of March, 1853. The boy was active and intelligent ; about twelve years of age ; who had been frequently used in going on errands, and especially accompanying the plaintiff in care of his horse and buggy to Sumterville, the Railroad, and elsewhere. On this occasion the plaintiff was absent on a visit to Charleston, and being expected that day, the boy Ned had been dispatched to that point on the road where plaintiff usually got on and off the trains. This was neither a depot, station nor turn out, and the train only stopped when passing for the accommodation of a few families in that neighborhood, and when occasion required. Such passengers were put off when on board or taken up on a signal at and near the place where the boy was killed, without reference to any precise point. The boy was lying along side of the rail, and asleep on his face, though outside of the track, on the ends of the cross ties, with his head to the west, and in the direction the train approached—the

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course of the road at that point being east and west. Road entirely straight for more than a mile west, and more than four hundred yards east, with a descending grade. The boy was lying on the south side, being the side on which passengers were usually landed, and the side opposite that at which he came to the road, having crossed and gone further west, fifty yards or more.

"A neighborhood road crosses two hundred yards east, and a cattle guard, with a board fence, twenty-four yards west, and on same side of road with body—an excavation above and an embankment below, and being a few feet elevation at the spot the boy was killed—a clear open plain otherwise.

"The train was running at the rate of twenty miles per hour, being the usual speed, and consisted of the engine and tender, a passenger car and two intermediate cars.

"The cow-catcher which extends over the rail and above it some two inches, passed without striking, but a bolt through the tender box, about the same distance from the rail, though a little more elevated, struck the head of the boy in the forehead, near the edge of the hair. The skull was fractured and scalp knocked back, blood and skin being found on the end of the bolt.

"The body was not seen by any one but the engineer, as his signal gave the first intimation that anything had happened. The Engineer and Conductor were examined on part of the defendants, and the Fireman on the part of plaintiff.

"The plaintiff did not return, as had been expected by his family, nor was there any other passenger to land there that day, and the habit was to pass with usual speed under such circumstances. The train passed also about the usual hour. Thus far I think there was no contest about the facts of the case.

"The great point of contest in the evidence seemed to be *the point* at which the body *might* and *ought* to have been seen by a vigilant Engineer, and the proper course to be adopted

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under various exigencies consequent upon such discovery ; and this too was the gravamen of the argument.

“And in this connection, the board fence, its construction, necessity, and precise proximity to the road was inquired after to determine whether this furnished any matter of obstacle and excuse.

“The plaintiff caused a little negro boy, on a subsequent occasion, to be placed at the spot, lying on his side, with head near the rail and body perpendicularly off, and several gentlemen walked from the body, observing at different points the effect produced by distance—50, 75, 100, 125, 150 yards, &c. They testified, that with his face towards them he could be recognized as a negro between 100 and 125 yards ; at a distance of 200 yards an object could be seen on foot, and on horseback 400 yards. Mr. Dinkins did not know but 600 yards.

“The fence they thought constituted no obstacle to the view, not approaching the track near enough even to one on foot, much less from an elevation. Mr. Dinkins, who spoke with most emphasis, said it was four feet from track, though others thought two or three feet. Dinkins said it was no more in the way than Sumterville or Charleston. The other gentlemen besides Dinkins were Rev. Mr. Graham and Col. Mellett, the latter testifying it would make a great difference in taking an observation, to be in motion one’s self at time. Mr. Singleton was once on a tender, not running very fast, when a negro had been placed at the spot, and he could recognize it as an object some 200 or 300 yards, and as a human being some 125 yards. He had placed the board fence at cattle guard to protect his fields, as near as he could well approach the rail, to permit trains to pass. He did not think the fence interposed any obstacle to vision.

“The engineer, H. H. Cole, not now in the employment of company, testified that he saw a small object about size of fist, on the rail, (afterwards ascertained to have been a clod of dirt,)

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at distance of twenty-five or thirty steps—was observing it particularly at ten steps, saw and as he passed recognised hand of human being. Shut off steam instantly, being all he could do; blew down the breaks and reversed his wheels. Stopped some two hundred yards or more, and backed up near. Conductor and passengers got out and examined, &c. This engineer and another examined, (a Mr. Gay,) thought the board fence would constitute an obstruction to some extent in discovering an object, situated as this body was, until very near. Each of them together, with Wilder the conductor, and Sherwood the mail agent, who had formerly been employed on road, all testified to the comparative and increased difficulties in making observations as between being at rest and in motion; the disadvantage much enhanced occasionally by smoke, strong breeze and speed—a comparison as between being on an elevation or on foot.

“They testified as perhaps did others, that on such a grade at this speed such a train, by all the appliances to be used, could not be taken up under two hundred and fifty or three hundred yards. *Jesse Windham*, the fireman, not professing much experience, thought it might be stopped in one hundred or two hundred yards, and Mr. Dinkins said, that once subsequently, to test this matter, a son of plaintiff intending to take passage, was concealed, until as the train was passing the guard fence, suddenly jumped out and made signal, and they took up in about 175 or 200 yards, and backed up for him.

“The character of Cole as a skilful, cautious, and careful engineer, whilst on this road, and for many years on the road in North Carolina, whence he came to this road, was very fully proven.

“On the cross examination of one, it was proved that he had once or twice drank very freely, but never on duty, and afterwards testimony of his sobriety when on duty, and especially of his having been entirely sober at the time, was multiplied.

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"Some other evidence was offered, showing the extent of the road running then as far as Hill's, perhaps, near the Pee Dee, connecting through by staging, carrying certain mails, though not the *great mail*, and as to the usual number of passengers, tonnage of engine, weight and length of other cars, &c., which I have not deemed of sufficient consequence to detail.

"The case was very fully presented by an elaborate argument of two counsel on each side to an intelligent jury.

"The jury were told that to entitle the plaintiff to recover damages for the negro, a negligent killing must be shown. That if there was negligence on the part of the company, or fault on the part of the engineer, or other agent or servant of the company, resulting in the death, the defendant must answer, otherwise the plaintiff's action must fall to the ground. These questions were to be settled by the special circumstances, to be ascertained by the jury. That the defendants were not to be excused by the mere fact that the negro, though having volition and intelligence, had voluntarily placed himself in danger, by lying down, and going to sleep on or near the track, if by proper care and conduct in reference to the management of the train, his life could have been saved. Distinguishable from the brute if any peculiar hazard attended one part of the road more than another, arising from descending grade, length of train, weight of engine, fences and cattle-guards, or other necessary incidents to railroads, the voluntary imprudence of one endowed with ordinary intelligence and acquainted with the nature and use of railroads, exposing himself to such increased danger, became an element in the question of negligence and fault. In this connection, I adopted the "proposition" of Judge Butler, in the case of *Felder vs. R. R. Company*, 2 McM., on page 406, holding this company to show; however, the special circumstances, and that no fault was imputable to the engineer having direction of the locomotive. I thought, and so said, that if the grass in that case could not avail to fix blame, a cattle-fence of ordinary structure and necessity could

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hardly create a liability here. Whether in fact, the fence in question constituted any obstacle, was much mooted. I have no idea that the decision of the case was affected by it. The jury were not *confined* to an inquiry whether there was "negligence in the engineer only," and if it so seemed to plaintiff, it was only that in my remarks to the jury, pursuing the general line of argument adopted by counsel, especial prominence was given to him and his acts, in the testimony and argument, and the legal consequences claimed to flow from his sins, whether of commission or omission.

"The jury returned a verdict for the defendants, as I thought they were fully warranted in doing, upon any just view of the facts in this case."

The plaintiff appealed, and now moved for a new trial, on the grounds :

1. Because his Honor charged the jury that if the fence at the cattle-guard obstructed the view of the engineer, then the plaintiff's case fell to the ground, as in that case no fault or negligence could be imputed to the engineer, and unless there was fault or negligence on his part, the plaintiff could not recover : Whereas, his Honor should have charged that there was or might be fault, carelessness or negligence on the part of the company, sufficient to make them liable to the plaintiff, in erecting, or permitting to be erected, a fence so near to the road, and on their own land, as to obstruct the view of the engineer.

2. Because the whole evidence made out a clear case of negligence, and his Honor charged to the contrary, and erred in this, that he confined himself and the jury to an enquiry into the question, whether there was negligence in the engineer only.

3. Because his Honor charged that the erection, or permitting to be erected, by the company, of a fence so near the

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road as to obstruct the view of the engineer, was no ground on which carelessness or negligence could be imputed to the company, although the obstruction was at a grade in the road, and the cars were there run at the usual speed of twenty miles an hour.

Mayrant and Richardson, for motion.

Haynsworth, Moses, contra.

The opinion of the Court was delivered by

MUNRO, J. Where a party seeks to recover damages for an injury to his person or his property, resulting from the negligence of another, to entitle him to recover, he must show that his own conduct has been free from blame; for if it be made to appear that he has contributed to his own misfortune, or that by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence, he is then considered as the author of his own wrong, and cannot recover—in other words, if the mischief complained of be the result of the combined negligence of both parties, they must remain in *statu quo*, neither party can recover against the other, for it is clear there must be wrong as well as damage, and there can be no legal injury, where the loss is the result of the common fault of both parties. 11 East, 60; 24 E. C. L. R. 369; 10 Mee. & Wels. 548.

If we subject the facts of this case to the test of the foregoing rule, it is clear that the plaintiff has entirely failed to exhibit such a case as entitles him to recover; for if it even be conceded the defendants were to blame in permitting the fence to be erected at the cattle guard, and that it interrupted the view of the engineer along the road—the ground by the way, that was chiefly relied on in the argument—it must at the same time be conceded, that the conduct of the plaintiff's slave, a

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being induced with reason and forethought, was, to say the least of it, not less culpable, in voluntarily lying down to sleep by the side of the track, over which he must have known the train was in the daily habit of passing at stated periods, and that if it did pass while he remained in that posture the consequences to him could hardly fail to prove otherwise than fatal.

But again, might not the consequences of the assumed negligence of the defendants, in permitting the erection of the above mentioned structure, have been easily avoided, by the exercise, on the part of the slave, of the most ordinary prudence? when all he had to do, in order to avoid the coming in contact with the train, was simply to have obeyed the natural instinct of self preservation, by keeping at a proper distance from the road; and if he felt disposed to go to sleep, to have selected a situation for that purpose but a few feet, or even a few inches removed from the place which he did select, and where he would have been entirely beyond the reach of danger.

But if we subject this case to the test of another rule, a rule not less important than the former in the adjudication of the class of torts to which this case belongs, and for the redress of which the present form of action is the appropriate remedy, namely: "that the damage must always be the natural and proximate consequence of the act complained of;" it will prove not less fatal than does the former, to the plaintiff's right to recover.

In the application of this rule to the case in hand, it is only necessary to refer to the ruling of the Court in the case of *Felder vs. The L. & Cin. R. R. Co.*, (1 M'Mul. 403.) In that case the plaintiff's slave went to sleep on the road, where the grass was so high as to obstruct the view of the engineer until the engine was too near to the body to stop it, so that it ran over the slave and killed him; and the Court held, "that the proximate cause of the slave's death was his own voluntary imprudence, in placing himself in a situation of danger;" and

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in reply to the argument that the defendants should be held liable for not keeping the grass cut down, that had obstructed the view of the engineer, the Court said—"This was a remote source of danger, and could not be regarded as the proximate cause of the accident, for the engine might have run over the boy, notwithstanding the high grass, as from the situation of the body, it might not have been seen by the engineer until it was too late to stop the engine."

The same will be found to have been laid down even more broadly than it was in *Felder's* case, by the Appellate Tribunal of an adjoining state, in the case of *Herring vs. The Wil. & Raleigh R. R. Co.*, (10 Iredell, 402.) In that case, two of the plaintiff's slaves were asleep on the track, when the wheels of the engine passed over one of them and killed him, and badly injured the other, but the Court said—"It cannot be inferred from the fact, that he (the engineer) made no effort to stop the engine, until he got within twenty-five or thirty yards of the negroes, for that was entirely consistent with the supposition that he had seen them for half a mile; because, seeing them to be men, he naturally supposed they would get out of the way before the cars reached them, and might well have continued under this impression until he got near enough to see that they were either drunk or asleep, which he was not bound to foresee; and his being then too near to stop, so as to save them, was their misfortune, not his fault."

Seeing then, that there has been no judicial error in the charge of the Circuit Judge, and that the question of negligence has been resolved by the jury in favor of the defendants, we can perceive no reason why the verdict should be disturbed.

The motion is therefore dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion dismissed.

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA,

Charleston—January Term, 1855.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

GRAFF & Co. *vs.* R. & A. P. CALDWELL.

Plaintiffs in Baltimore consigned certain goods to defendants in Charleston, who were auctioneers, and who sold the goods. The action was for the proceeds of sale. Defence, that plaintiffs had a lien on the goods by reason of advances made to one B., who had possession of one of the bills of lading, and who claimed the goods,—*Held*, that the defendants could not read in evidence a letter received by them from B. which enclosed the bill of lading.

That defendants could defend themselves by showing that plaintiffs had sold the goods to B., but that B.'s possession of one of the three usual bills of lading was not of itself sufficient evidence that he owned the goods.

IN THE CITY COURT OF CHARLESTON, JULY TERM, 1854.

THE report of his Honor, the Recorder, is as follows:

"On a former trial of this case, the Court below granted a *nonsuit*; which nonsuit was appealed from, set aside, and a

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new trial ordered by the Court of Appeals. It may save much time and unnecessary repetition in this report, to refer to the report of the case in 7 Rich. 130. The testimony on the *new trial*, on the part of the plaintiffs, was *substantially* the same as on the *first*. It will be perceived, by reference to the report of the case in 7 Rich., that the plaintiffs relied on that trial, simply upon the legal force and construction of a *bill of lading of goods*, to the defendants, *commission merchants and auctioneers in Charleston*, directly consigned by the plaintiffs to them, as devolving upon the defendants, the obligation to account to the plaintiffs for the sale or disposition of these goods.

“I understand the decision of the Court of Appeals, in setting aside the nonsuit to be grounded upon this:—

“That, by the mere force of the bill of lading between the *consignors and consignees*, directly (at least, under the circumstances of this case, as developed on the trial), the defendants were bound to account to *them* for the sale and disposition of the goods consigned. Hence, that they were bound to show in discharge or defence, the *true relation* they occupied, in regard to any *third person*, from whom they alleged or pretended to have received the bill of lading, and on the *faith* of which it was said they had *made advances*. This was undertaken to be done by the defendants on this second trial. There was considerable evidence offered on their part, to meet this view of the case taken by the Court of Appeals. *All the facts*, as far as questions of fact were involved, were submitted entirely to the jury, as belonging to their province to ascertain and determine—under instructions to the jury as to the law, which are complained of only so far as the two grounds of appeal of the plaintiffs are concerned. The jury found a verdict for the defendants, and I have received the annexed notice of appeal. The first ground complains, “*That his Honor erred in permitting defendants to introduce a letter directed to them, purporting to come from one C. W. Bingley—that the letter so introduced was not proven to be in the handwriting of Bingley,*

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by competent testimony." It seemed to me clearly competent for the defendants to show, and that they were indeed called upon to show how, and under what circumstances, they had received the bill of lading from Bingley. Indeed, in the absence of any such showing by the defendants, the plaintiffs might well have urged, in the way of conjecture or presumption, a want of fairness on their part in the transaction. The handwriting of the supposed writer of the letter, C. W. Bingley, was proved in the usual way, by one or more witnesses, and as a question of fact, was submitted to the jury. The letter objected to was therefore admitted. In regard to the second ground it appeared from a certain letter of plaintiffs to defendants, introduced in evidence, and which will be annexed, that the said C. W. Bingley, had made a purchase of these brandies from the plaintiffs in Baltimore; that the vendors, under his direction, shipped them to Charleston, to the defendants, *directly*, without naming Bingley at all in the bill of lading. That the defendants had, as far as it appeared, in *good faith*, treated with Bingley as the lawful owner of the goods in question, and had made advances to him on the bill of lading, *before the* arrival of the goods, equal to or exceeding their value. I did regard, under the circumstances, the defendants as not accountable to the plaintiffs for the proceeds of the sale, and so instructed the jury, in the absence of any imputation or suggestion of fraud on their part, (which was not only not pretended, but expressly disclaimed)."

The plaintiffs appealed on the grounds :

1. That his Honor erred in permitting defendants to introduce a letter directed to them, purporting to come from one C. W. Bingley, and that the latter so introduced was not proven to be in the handwriting of Bingley, by competent testimony.
2. That his Honor erred in charging the jury, that Bingley's written letter to R. & A. P. Caldwell, coupled with his posses-

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sion of the bill of lading, was sufficient evidence of ownership to authorise R. & A. P. Caldwell to make advances to him, and that the ownership of Graff & Co. was thereby determined.

3. That the jury, thus misdirected, found their verdict against law and evidence.

Porter, for appellants.

McCrady, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case, as in many others, we are constantly reminded of mercantile law, as if it was some strangely mysterious science, known only to those who are constantly engaged in enforcing it. But, as was ruled by Lord Mansfield, and his associates, in *Pillans & Rose vs. Van Mirop & Hopkins*, Burr. 1665, I think we may reply to all such suggestions, "the law of *merchants* and the law of the *land is the same*," and, as in the administration of the latter, mistakes may occur in its application to facts not understood, or imperfectly stated. But, generally, there is less difficulty in deciding a question of mercantile law, which is said to have been placed by Lord Mansfield on exact right, than in more abstruse, and refined technical principles.

In this case, at this time, I first intend to consider, whether the letter of Bingley, and its contents, were admissible in evidence on the proof before the recorder, and if not, on what proof, and how far it may be evidence.

1. The recorder tells us, that it was received on the proof of the handwriting of Bingley. On such proof, it was no more than Bingley's declarations, and was most clearly inadmissible. If it can be shown, as was said in the argument, that the letter of Bingley was received by the defendants, and that it con-

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tained the bill of lading, then this so far is admissible, as a fact, that the defendants thus became possessed of the bill of lading; but then the contents of the letter could not be read. The rule in this respect, may be better illustrated by supposing, that Bingley in person had delivered the bill of lading to the defendants. This fact may be proved, but the witness could not go on and state Bingley's declarations, as to his title, or the disposition of it, until his right of disposition was otherwise shown.

2. The recorder says, that he instructed the jury, that the defendants, under the circumstances, were not accountable to the plaintiffs for the proceeds of the goods sold. This Court, when the case was before us a year ago, ruled that the defendants must account to the plaintiffs from whom they received the goods, unless they can show, that the right of the plaintiffs has been transferred to some other person. 7 Rich. 183.

It does not appear that the jury, under the instruction of the recorder, passed on any such question. Primarily, the accountability of the defendants to the plaintiffs, is shown by the shipment. For it must be remembered that a consignee's right is not generally that of owner. Usually cotton is sent by the owner to a factor for sale, so goods are consigned to auctioneers for the same purpose: there is in such cases no right of property for any other purpose. That was the case *here*; the defendants were auctioneers; the goods were sent to them for sale, and hence the ruling formerly in this case.

The doctrine of stoppage in transitu, has nothing to do with this case. The inquiry is one of fact, did Graff & Co. sell and deliver the consignment to Bingley? It is plain they once contracted to sell. But it may be, as they affirm, that they never delivered constructively the goods to him, and that their shipment to the defendants, with their private marks on the bungs, was enough to have so informed them. The bill of lading is strictly assignable only by the consignees; it is true, the shippers having the right of property, can by writing on it,

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or in any other manner, whereby they change the right of property, pass to another all their rights.

The possession of one of the three usual bills of lading, by a third person, neither consignor, consignee, nor master, does not of itself give the rights of the consignor to him. There must be other facts shown, such as that he was owner of the goods, having bought them from the consignor; or that the consignor delivered to him the bill of lading to give him the control of the goods, or their proceeds, in the hands of the consignee. In either of these cases, or others of similar character and effect, it may be, that a payment to the holder of the bill of lading would be good.

It does not seem to me that the recorder properly understood the question under this second head, and that the case under it, as well as the first ground, should go back for another investigation.

The motion for a new trial is granted.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

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C. B. VERDIER, Ex'x, vs. A. VERDIER, ET AL.

In charging a jury the judge may give them his opinion upon a question of fact.

Because the judge in charging the jury confounded the names of some of the witnesses, *held* to be no ground for a new trial.

Of the three subscribing witnesses to a will, near thirty years old, two were dead and their signatures were proved. The surviving witness recognized his signature, but had no recollection of the transaction:—*Held*, that the will was sufficiently proved.

A testator, when executing his will, need not make formal publication of it, nor even declare the nature of the instrument.

A great change in the pecuniary circumstances of the testator, and some change in his social relations and moral duties, *held* not to amount to an implied revocation of the will.

BEFORE MUNRO, J., AT COLLETON, SPRING TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“This was an appeal from the Ordinary of Colleton district, admitting to probate the last will and testament of the late Simeon Verdier. The paper propounded as the will purports to bear date on the 5th of September, 1825, and the testator departed this life on the 21st day of June, 1853. The will was admitted to probate in common form on the 19th day of July, 1853, and the decree of the Ordinary admitting it to probate in solemn form bears date the 27th day of March, 1854.

“The entire will is in testator's handwriting, and on the back of it is the following memorandum, also in his hand-writing: “S. Verdier's will, not to be opened till after death, or otherwise null and void.” There is also indorsed on the back of it the following certificate: “This will was opened at the house of Mrs. Verdier, this 18th July, 1854, in presence of us—S. P. Deveaux, A. Verdier, James S. Glover.” At the time this will was executed, the entire estate of the testator, real and

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personal, was estimated at between five and ten thousand dollars, and at the time of his death its value was estimated at between three and five hundred thousand dollars.

“The testator devised and bequeathed to his wife the whole of his real and personal estate, except the sum of three thousand dollars, which he bequeathed to the eldest son of his next brother if alive, if not, then to the eldest son of his next brother, but if not alive, then to the eldest child of his sister, but in case either his father or mother were living, the said sum to them during their natural lives, then to revert to those already specified. He appointed his brother-in-law, James Boman, executor, and his wife, executrix; the former of whom I think died previous to the testator, so that his widow alone qualified as executrix and is now the plaintiff in this proceeding. The surviving relatives of the testator consist of a brother, A. Verdier, who resides in France, and two nephews, Augustus Verdier, a son of the former, and J. A. Fraysse, son of a deceased sister, both of whom were brought from France to this country several years ago by the testator, and who rendered him important service in the management of his affairs, and towards both of whom, and especially to the former, he manifested a strong attachment. These last mentioned parties are now the appellants, and appealed from the decree of the Ordinary on the following grounds :

“1st. Because as touching the formal execution and legal validity of the paper propounded in this case, the demands of the law have not been complied with.

“2d. Because the proof submitted establishes a clear case of revocation.

“3d. Because the paper propounded is not the will of Simeon Verdier, he having lived for many years and finally died under the persuasion that said paper was not in existence, and the attempt now made by the executrix to set up said paper is a fraud upon the just rights of the heirs of S. Verdier.

“4th. Because said paper is avoided and set aside by law

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—the alleged testator having long believed it lost or destroyed.

“5th. Because said paper is produced and offered for probate under circumstances so suspicious, as to stamp with fraud the attempt on the part of the executrix to set it up.

“Although all the foregoing grounds were more or less debated on the circuit, those upon which the appellants chiefly relied, were the informal execution of the will and its implied revocation. The subscribing witnesses to the will were Wilson Langley, Joel Laricy, and Crispian Cannady.

“In reference to the first witness, Wilson Langley, it was proved by James Bailey, Gideon B. Ulmer, Thomas Pritchard, Archibald Campbell and Lawrence McCants, that he resided in Walterboro, in the year 1825; that in 1834 he removed to Alabama. Some of them stated they had heard of his death shortly after his removal. Nearly all of them however concurred in saying he had not been heard of for more than seven years; that while he resided here his character was good.—His handwriting was proved by Bailey, Campbell, and McCants.

“In reference to the second witness, Joel Laricy, it appears there are two persons of that name, uncle and nephew; the latter, however, was the witness to the will. He testified that the signature to the will was his; but he had no recollection whatever of the transaction, nor of his having seen the other witnesses sign it, but stated he was satisfied he must have been asked by the testator to sign it, as he would not have signed a paper for any one, without having been asked to do so. It appears that when the will was proved in common form, this witness was absent from the State, and that Joel Laricy, senr., swore before the Ordinary that the signature was his. This witness however, stated that his uncle is about 80 years of age, and for the last four or five years he has considered him in his dotage. Crispian Cannady, the last witness to the will, was proved to have been dead about 19 years. His hand-writing

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was proved by his brother, Thomas Cannady, and Archibald Campbell. His character was proved to have been good.

“In reference to the 1st ground of appeal, in which I am charged with having assumed the province of the jury, in deciding upon the facts, I would merely state that it is founded upon a total misapprehension of my charge. What I did state to the jury, and what I thought the circumstances of the case warranted me in stating, was this, that if they had faith in human testimony, I thought from the characters of the witnesses who testified to the handwriting of the deceased subscribing witnesses, the genuineness of their signatures could scarcely be doubted, and as to the question of the execution of the will, I read to them the Act of 1824, providing the manner in which wills must be executed, and expressly charged them, that, to sustain the will, they must be satisfied that the signatures of the witnesses were genuine—that the witnesses were credible, and that they must have subscribed their names to the will in the presence of the testator—that if they were satisfied all these things had been done, and that the will had been executed in conformity with the requirements of the law, it was their duty to sustain it—but if they thought otherwise, it was equally their duty to declare it void.

As respects the fourth ground of appeal, I did charge the jury, that no change in the pecuniary circumstances of the testator, between the execution of the will and his death, nor in his ‘social relations and moral duties,’ such as had occurred, amounted to an implied revocation of it.

“As to the fourth ground of appeal, it is very clear that Joel Laricy did not prove the handwriting of Langley; neither did McCants prove the handwriting of Cannady; although I am free to admit, that it is quite probable that in commenting on the testimony of so many witnesses, some of whom testified to the handwriting of the deceased subscribing witnesses, while others testified to their characters, I may have occasionally confounded names—but of this I am certain, that in the notes

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of my charge, I find the name of Laricy as a witness, who proved his own and his uncle's signatures, and the name of McCants, as one of the witnesses who proved the signature of Langley. But I am not a little surprised, that this mistake was not brought to my notice at the time it occurred, when it could so easily have been corrected, and that it did not occur to the appellants' counsel that the same measure of justice that claims for this imputed error a reversal of the verdict as it now stands, might have been equally imperative in demanding its reversal had it happened to have been the other way."

The defendants appealed on the grounds :

1. Because his Honor, the presiding Judge, assumed the province of the jury in deciding the fact, that the execution of the will was clearly established, and charged the jury that they must find in favor of the will if they believed in human testimony.

2. The execution of the will was not established beyond doubt, and the question of execution should have been submitted to the jury as a fact exclusively for their decision.

3. Because his Honor charged the jury that no change in the circumstances, social relations or moral duties of Simeon Verdier, could operate as an implied revocation of his will, whereas, defendants submit that there was abundant evidence to establish a case of implied revocation.

4. Because his Honor charged the jury that Joel Laricy was one of the witnesses who proved the signature of Wilson Langley, and that L. W. McCants was one of the witnesses who proved the signature of Crispian Canaday, two of the witnesses to the will, when in fact, neither the said Joel Laricy nor the said L. W. McCants were examined as to the signature of either of the said witnesses, and gave no testimony in relation thereto.

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5. Because the charge of his Honor, the presiding Judge, and the verdict of the jury, were in other respects contrary to the law and the evidence.

Henderson, carn, for appellants.

Perry, contra.

The opinion of the Court was delivered by

WHITNER, J. The facts of this case make it somewhat peculiar. It is, perhaps, not surprising, that, when a paper is offered for probate nearly thirty years after its execution, and when the few thousand dollars it was originally intended to dispose of, have grown into the unwieldy sum of as many hundred thousand, the contest for the spoils should be pressed to a tribunal of the last resort. The points presented for adjudication to this Court, however, are without much difficulty.

Some of the grounds of appeal complain that the presiding Judge was too explicit in his charge, and invaded the province of the jury. In vindication, I shall content myself with a reference to the report of the judge, freeing the case from some of the misapprehensions of counsel, and also to the opinion of GLOVER, J., in the recent case of *Kirkwood vs. Gordon*, 7 Rich. 478, fortified by the authority of the venerable Lord Hale, in his History of the Common Law, 256, 257, treating of the duties of Judges and juries. The rule he lays down, has always been acted on in this State. "That the Judge who presides, shall always *direct* the jury in matters of law before they retire or withdraw, and also *assist* them as to *matters* of fact, weighing the evidence before them, and observing where the main question or knot of the business lies; and sometimes by giving an *opinion*, even in *matters of fact*, which is a great advantage to laymen." This court cannot undertake to designate

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by rule, the *manner and form* wherein an opinion entertained by the Judge of the facts of a case, shall be made known to a jury. Looking to the brief, certainly the conclusion to be arrived at by the jury, was fairly put in the alternative, and the opinion indicated on the proof offered, was well warranted. In these particulars, therefore, we find no just cause of complaint.

The fourth ground presents somewhat an anomaly as matter of appeal. It is in substance, that the Circuit Judge, in summing up the testimony, confounded the names of the witnesses. There is no allegation that such proof was not made, and by credible persons, but that the facts were proven by other witnesses than those named. It cannot be that the jury were then misled. This is of frequent occurrence, usually corrected by suggestions at the bar, if deemed of consequence, and otherwise readily detected by jurors to whom the witnesses are generally more familiarly known. Such an objection cannot avail the appellants.

The appellants object to the verdict of the jury in argument, because of the informal execution of the will, and the want of sufficient proof of any execution of the paper. Such objections, I presume, may be regarded as covered by the fifth ground. The will purported to be attested and subscribed by three witnesses, each of whom was *credible*. Two of them were dead, and the ordinary proof of genuineness of signatures was made. The surviving witness had no recollection whatever of the transaction, but recognized the genuineness of his signature, and was satisfied he must have been asked by the testator to sign it, as he would not have otherwise signed. His character, it is conceded, is above imputation. It is not necessary, as has been contended, that the witnesses should subscribe in the presence of each other. The statute is satisfied, where each witness has signed in the presence of the testator. 5 Stat. 107, A. A. 1789, Sect. 2: 6 Stat. 238, A. A. 1824, Sect. 8.

Neither is it necessary, as has been insisted, that there

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should be proof of *formal publication* of the will by the testator. The will may be good without any words of the testator declaratory of the nature of the instrument, or any formal recognition of it, or allusion to it. Jar. on Wills, 71-2, and cases cited. Here the testator prepared and subscribed the paper with his own hand, and well knowing the instrument therefore, produced it to three witnesses to attest. The design of publication in such case, therefore, is well met.

The third ground complains that the Judge charged the jury that no change in the pecuniary circumstances of the testator between the execution of the will and his death, nor in his "social relations or moral duties," such as had occurred, amounted to an implied revocation. This, at least, was the instruction as set out in the brief. When it is shown that a will has been duly executed, it remains of force until revoked. Ambulatory in its nature during the testator's life, a will, of course, may be revoked at pleasure, yet no implication arises by mere lapse of time intervening. The legislature has attempted with care to provide against frauds and impositions in reference to wills, as well in their execution as in their revocation. Hence, to guard against the admission of loose and uncertain testimony to operate against an instrument so formally executed, the same statutes above cited, provide, that *no devise or will shall be revocable*, but in the manner or by the means set forth; if in writing, with the same formalities that are required in the execution of the will, "or by *destroying* or *obliterating* the same by the testator himself, or some other person in his presence, and by his direction or consent;" A. A. 1789, Sect. 3; A. A. 1824, Sect. 9: and again having reference to a *change* of social relations, by 10 Sect., A. A. 1789, it is declared, "If any person making a will, shall afterwards marry and die leaving issue, it shall be deemed and taken to be a *revocation* of such will to all intents and purposes."

The proof failing to meet the requirement of the statute, the question has been raised, whether a will may be revoked by

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implication of law, and upon facts, without the purview of the statute, or, as is elsewhere expressed, where there is a presumed alteration of intention arising from the occurrence of new moral duties, which in every age, and almost in every breast, have swayed the human affections and conduct.

Ch. Kent says, This question has given rise to some of the most difficult and interesting discussions existing on the subject of wills. Extreme cases are found in the books well calculated to test the principle, but in the case made, this Court adopts the ruling of the Circuit Judge as free from just cause of complaint. Notwithstanding the mysteries thrown around the transaction, a different conclusion than the one attained by the jury upon the facts would have been well calculated to break down the land marks of the law, and would have virtually operated as a repeal of the statute.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Wolf vs. Cohen.

JULIUS M. WOLFF vs. N. A. COHEN, A. N. COHEN, AND L. COHN.

In an action for assault and battery no evidence implicating one of the defendants was given by the plaintiff, but the defendants in their cross-examination of a witness proved that all the defendants had been indicted and convicted for the same offence:—*Held*, that this was sufficient evidence to authorize a verdict against all the defendants.

That the defendants had been punished *criminaliter* for the same offence, cannot be shown in mitigation of damages in the civil action.

New trial on the ground of excessive damages, refused.

BEFORE WARDLAW, J., AT CHARLESTON,
SPRING TERM, 1854.

THE report of his Honor, the presiding Judge, is as follows :

“ Action of trespass for assault and battery ; damages laid at twenty thousand dollars. Plea, *non cul*.

“ The material evidence here follows, for plaintiff :

“ *A. H. Lester*.—Was clerk in the store of N. A. Cohen & Co., on the bay, wholesale clothing—partners, N. A. Cohen & Leopold Cohn. Aaron N. Cohen (son of N. A. Cohen) was doing, for himself, retail business of like kind on King street, and so was the plaintiff, Wolff. By directions of one or both partners, I carried this letter and delivered it to plaintiff, at his store—it is in the handwriting of Cohn. Letter addressed to ‘ J. M. Wolff, King street.’

“ ‘ *Sir*,—You will please call at our store on business of importance.

“ ‘ N. A. COHEN & Co.

“ ‘ *Charleston, November 4, 1852.*’

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"After doing some other business I returned to the store, and as I entered the front door of the store, I saw plaintiff go out of a side door—he was moving, and at some distance; but seemed to have been beaten, as his eyes were bruised. I went to the second story, found N. A. Cohen there—recollect nobody else. Aaron N. Cohen and L. Cohn, I think, were about the premises. On the second floor I saw signs of blood and water. I did not go into the third story. Dr. A. Pelzer passed up or down. N. A. Cohen had cut his finger; suffered from it, and was attended by a physician. I do not know what the previous relations of the parties were. I do not recollect having ever before seen the plaintiff at the defendants' store. No efforts have been made to keep me from testifying.

"*H. W. Schroeder, Esq.*—I have been of counsel for plaintiff—expect to be paid, whether he recovers or not—no arrangement made about the fee. I brought the case to Mr. Yeadon, and he insisted that I should be attorney on record; although I desired to withdraw from the case.

"I was at plaintiff's store, buying a pair of gloves for a Masonic procession, when Lester brought this letter, saying that Mr. Cohen had desired him to hand it. Plaintiff read it, and handed it to me. Plaintiff walked down King street with me; we parted in Church street, I went to my office, in St. Michael's alley, and he toward defendants' store. After half an hour, Pat. Dunning, constable, brought into my office a man that, at first, I did not know, but soon discovered to be the plaintiff—he was beaten, bloody, swollen, and disfigured. I asked what was the matter. Plaintiff made no answer, but there seemed to be a gurgling in his throat. He appeared to be fainting—was laid on a sofa. Dr. Graham came in with him—he is now dead. I went for another physician, believing that the plaintiff was dying. I called at Dr. North's, he was not at home. I went for Dr. Mitchell, who came and administered. Plaintiff recovered, and Sol. Moses took him away

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in a buggy. [Clothes produced.] I cannot identify them. Plaintiff's face was swollen, and the whites of his eyes were green when he came—there was a piece of court-plaster on his face.

“*Cross-examination.*—Dr. Graham was a man of ability, but intemperate—had an office in Church street, between Cohen's and my office.

“I think the plaintiff had one or two convulsions on the sofa—his muscles were rigid—he remained at my office a half hour or so. Was brought about ten o'clock, A. M. I saw him again about eight o'clock that evening, Dr. Graham was then coming out. Several times afterwards I saw him before he left his bed.

“I presume the plaintiff was brought to my office for the purpose of legal proceeding; but he was not then in a condition to make an affidavit. I advised both civil and criminal proceedings. The three defendants were tried under an indictment and convicted. I do not remember that any witness was examined besides the plaintiff, the prosecutor.

“Two painters, Doherty and Kidd, I understand were working at N. A. Cohen's at the time of the affair—they were bound over—went away just before the former trial; were subpœnaed, and went away again ten days ago.

“The letter fell out of the plaintiff's pocket in my office, and has been in my possession ever since. The plaintiff was confined to bed about a week; bruises visible on him sometime afterwards.

“*W. Rhett, Esq.*—At the office, thought plaintiff had convulsions; did not know Graham was a physician, and advised Schroeder to call a physician. Did not at first recognize the plaintiff, he was so bloody and swollen; think I have seen worse cases of beating, but, in the bustle, I thought his life was in danger.

“*Henry Buist, Esq.*—In the office just before Dr. Mitchell

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came, and just after the convulsion spoken of. Plaintiff was well beaten. I did not recognize him.

“Dr. North.—Plaintiff’s physician. I saw him twice at his own house, and as Dr. Graham was attending, I turned the case over to him, there being no necessity for consultation. I dressed one wound with a few straps. There were cuts about the forehead and cheek—evidently a severe beating, with more than two blows, but not dangerous. I saw no sign of convulsion—got there some hours after the affair.

“Dr. Pelzer.—After breakfast, L. Cohn stopped me in the street, and requested me to go to his store. I went; was told that Mr. Cohen was up stairs; went up; found a person sitting on a bench, and N. A. Cohen in front of him on a box, all quiet. Water had been used, and the face of the person (that I did not then know, but now take to have been the plaintiff) had been washed; a piece of plaster had been put on his nose, and another above one eye. He complained of his chest, but I saw no bruises on it. When I went up (third story I think it was) N. A. Cohen asked me what I wanted. I said that Mr. Cohn had sent me. Cohn followed me up, and soon Aaron N. Cohen came up. Whilst I was talking, in a very few minutes after I went up, the plaintiff got up and walked down. He went without difficulty, and I did not think the beating was anything serious; not so bad as Mr. Schroeder’s description makes it.

“After the plaintiff went, N. A. Cohen showed me his hand; there were two or three bruises on it; he said he had been bitten.

“George Prince.—Have attended a good many cases as a Thompsonian practitioner. Went as a neighbor to see the plaintiff, on the evening of the beating. He was in bed, in a convulsed way. Dr. Graham was there.

“Cross-examination.—His doors were closed one or two days.

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“Dr. Mitchell.—Not physician of any of the parties. Was called; went; recommended cold water. Dr. North was announced, and I came away after a moment's stay. Plaintiff was in a chair; seemed to have received two or three severe blows. I saw no signs of convulsion.

“John G. Chalk.—Saw the plaintiff in bed—bruised and fainting.

“J. J. Bluett.—Two or three days after the affair, went to arrest the plaintiff under warrant taken by N. A. Cohen; found him unfit to be removed; beaten.

“Theodore Speisegger.—Saw Wolff at home on the night of the affair; my compassion was moved.

“Jacob Simon Jacob.—Heard N. A. Cohen say Wolff would gain the first suit, and lose the next.

“Thomas Allison.—Saw Wolff in bed on the day of the affair; badly beaten; hardly recognized him.

“Patrick Dunning.—Saw a man come down Church street with a handkerchief to his face; said he had been beaten; seemed not to know how to go, I assisted him. Dr. Graham now joined us.

“No evidence was offered on the part of the defendants.

“The jury were addressed by two counsel on each side.

“In the opening address, one of the counsel for the defendants spoke of the heavy punishment which the defendants had already endured.

“One of the counsel for the plaintiff stated the sentences which had been passed upon the defendants in the Court of Sessions, some of the remarks made by the judge on that occasion, and some other particulars which attended the State case; he spoke of the great fortune of the defendant, N. A. Cohen, and of the plaintiff's narrow means. I was often inclined to interfere; but could at no time be sure that the

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decent administration of justice, and the unprejudiced consideration of the evidence by the jury, would be promoted by my interference.

“I said to the jury, that concerning the propriety of allowing to one beaten the advantage of remedies both civil and criminal, there had been at different times various opinions and practice—that now it was usual to suspend the sentence in the criminal case until the civil was tried; but that where (as in this case) sentence was already passed, it did not appear to me that the range of a jury’s discretion, in awarding damages, was thereby narrowed; but that it was sufficient, on that head, to say that there was no evidence (independent of the statement of counsel) of what the punishment, which had been imposed for the satisfaction of criminal justice in the case, had been, and therefore that matter should be laid out of view.

“The jury, in a verdict of peculiar form, found for the plaintiff five thousand dollars against N. A. Cohen; two hundred dollars against Leopold Cohn, and one hundred dollars against Aaron N. Cohen.”

The defendants appealed, and now moved this Court for a new trial, on the grounds:

1. That the fact of the defendants having been indicted and convicted for the same assault and battery as the cause of action in this case being in evidence before the jury; and the plaintiff’s counsel having stated the particulars of the sentence of the Court of General Sessions, it is respectfully submitted that his Honor erred in charging the jury that they could not consider the criminal prosecution and the consequent punishment of the defendants, as circumstances in mitigation of damages.

2. That there was no evidence whatever to implicate the defendant, Aaron Cohen.

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3. That there was no evidence whatever to implicate the defendant, Leopold Cohn.

4. That, as there was no evidence whatever of the fortune or means of the defendants, the jury had no excuse for so enormous and disproportionate a verdict against the defendant, Nathan A. Cohen, except the assertions of the plaintiff's counsel about the great wealth of this defendant, which were unwarrantable according to the rules and practice of the Court, and calculated improperly to influence the jury.

5. That the verdict was excessive, unreasonable and capricious, and unwarranted by the evidence; and that if, under all the circumstances of this trial, it be confirmed by the judgment of the Court, a dangerous precedent in the administration of justice will be established.

Northrop, Memminger, for appellants, cited 2 Hill, 625; 1 Green. Ev. § 538; 1 Stark. Ev. § 71-2; *Mayby vs. Avery*, 18 Johns. R. 352; 5 T. R. 257; *Poppenheim vs. Wilkes*, 2 Rich. 104; *McConnell vs. Hampton*, 12 Johns. R. 234; 1 Strob. 313; Sedg. on Dam. 39.

Hayne, Yeadon, contra.

The opinion of the Court was delivered by

GLOVER, J. Not denying the participation of Nathan A. Cohen, the appellants have earnestly insisted, that the other defendants are not implicated. All who act in concert, encourage one another, and co-operate, are liable in trespass. No witness proves by whom the battery was committed, but there are circumstances which, without explanation, show that Cohn was a prominent actor. In the name of the firm, of which he was a partner, he wrote the letter soliciting an interview with the plaintiff, the professed object of which was busi-

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ness of importance, and the only consequence which appears to have followed was the battery complained of. The result of this visit cannot be reconciled with the innocence of Cohn, and the reasonable inference is, that the real intention was to commit violence by concert, and under the pretence of business. By his prompt agency a physician was procured, which removes all doubt of his presence when the trespass was committed. The probable presence of Aaron N. Cohen about the premises, and the fact that Dr. Pelzer, after his arrival, saw him, are too slight circumstances to authorize the presumption that he was implicated. *Prima facie*, if not conclusive evidence, however, implicating both A. N. Cohen and Leopold Cohn, was furnished by the defendants in their cross-examination of Schroeder, who proved that the defendants had been indicted and convicted for the same assault and battery. It is their evidence, and they cannot now object to it on the ground, that, as to the matters involved in the issue, it was *res inter alios acta*. In this form of action, neither the record of their conviction, nor parol evidence of it, would have been admissible for the plaintiff, unless received without objection, or the defendants had pleaded guilty to the charge in the indictment.

Another ground relied upon in support of the motion for a new trial is, that the punishment of the defendants criminally, should have been submitted to the jury in mitigation of damages. The objection taken by the appellants to the introduction of evidence showing the conviction of the defendants, would equally apply to any proof offered in regard to the punishment. The indictment and civil action are prosecuted for the same trespass, but not by the same parties. One is an offence against society, the other a private wrong. The State punishes for a breach of the public peace; the individual recovers damages for the injury to his person, and where the compensation is beyond the actual loss, it may operate, incidentally, as a penalty, but not as a cumulative remedy. If the punishment of the offender should be permitted to influence the jury in

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their estimate of damages, the private remedy, which the law gives to the injured party, would be abridged. Where the prosecutor receives a part of the pecuniary penalty, it has been held, that his damages should be nominal, (*Jackson vs. Bell*, 3 Carr. & Payne, 316), but in this State he is entitled to none of the penalty, and is not restrained from prosecuting both the indictment and civil action together. In *Cook vs. Ellis*, (6 Hill, 465,) the Court did not regard either the probable or actual punishment of the defendant, by indictment, in an action for damages. The parties, the nature of the offence, and the remedies, are different; and where circumstances of aggravation call for vindictive and punitive damages, the range of the jury's discretion should not be narrowed by the sentence of the Court. Such were the instructions of the Circuit judge, and they are approved by this Court.

The appellants have also submitted, in support of their motion, that the verdict is excessive, unreasonable and capricious, and unwarranted by the evidence.

In cases of tort, the amount of damages depends upon, and is so blended with questions of fact, that the control exercised by the Court over the verdict of a jury must rest upon the peculiar circumstances of each case. Whether the compensation shall exceed the actual loss or injury, or the evidence shall justify exemplary damages, it is the province of the jury to measure them. In the discharge of their duty, the law requires that they shall be indifferent between the parties, and not influenced by passion or prejudice. It is not perceived that they were improperly influenced in this case, and there are circumstances from which a concert among the defendants may have been inferred, and also a purpose to inflict the battery without any provocation to justify or extenuate it. It is probable that this Court would not have come to the same conclusion, but a new trial will not be granted merely because the Court and jury differ in opinion about a question of damages. There is no legal rule to measure them, and by which the discretion of a

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jury may be controlled. We cannot conclude that the jury, in their estimate of damages, was influenced by any improper bias, or that they exceeded the reparation which such a trespass demanded. In actions of tort, a verdict free from the imputation of corruption, prejudice or passion, should be the end of litigation.

Motion dismissed.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

Motion dismissed.

Teague vs. Rail Road Company.

A. G. TEAGUE vs. SOUTH CAROLINA RAILROAD COMPANY.

Assumpsit for breach of contract. No special damages laid in the declaration. Plaintiff issued a commission to establish special damage:—Held, that inasmuch as the evidence was irrelevant, the costs and expense of the commission should not be taxed for the plaintiff against the defendant.

IN THE CITY COURT OF CHARLESTON, JULY TERM, 1854.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Conner, for appellants.

Moury, contra.

The opinion of the Court was delivered by

WITHERS, J. In his declaration the plaintiff demands damages for breach of contract in the non delivery of ice at Aiken. No special damages are laid, and it is conceded none can be recovered in this action for want of such averment.

Nevertheless the plaintiff's attorney caused a commission to be issued for the procurement of testimony at Edgefield Court House, with a view to establish special damage resulting from the uncontested default of the defendant in the non delivery of the ice, as in duty bound: and the expense of procuring such testimony (comprising attorney's tax costs upon commission issued, and compensation to commissioners, amounting to thirty-eight dollars and fifty-six cents), has been charged and allowed against the defendant: and the ground of appeal questions the liability of the defendant to respond to this item of the costs, upon the ground, that the testimony was wholly irrelevant to

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any issue joined: that this was obvious from the beginning and arose from nothing *ex post facto*, (as it is argued): and that, in fact, the testimony was ruled out upon the footing of irrelevancy.

According to our cases, costs are not taxable for a witness who was interested in the event of the suit, though subpoenaed regularly and examined at the trial after release had made him competent, (*Rice and Craven vs. Palmer*, 2 Bail. 117,) nor for witnesses who were subpoenaed, but not sworn, unless it be shown, satisfactorily, that they were material to the issue, or summoned in good faith in the belief that they were, (*Taylor v. McMahon*, 2 Bail. 131) but costs are taxable upon commissions containing testimony material but not adduced, because the course of the adverse party had supplied such testimony, or superseded the use of it; and full costs are demandable, where resort is had to the superior jurisdiction under circumstances going to show the good faith of the plaintiff in that particular, and that he did not act wantonly, though the sum recovered should be within the summary jurisdiction. (*Furman & Smith vs. Peay*, 2 Bail. 612). And notwithstanding the English rule was, when Hullock wrote (*vide his Law of Costs* p. 437) that "the costs of examining witnesses on interrogatories are always borne by the party obtaining the rule for such examination, and do not abide the event of the cause, unless so ordered by the court," yet it has been adjudged here (*Kirkley vs. Nolley*, Hill, 1398) that the necessary costs of executing a commission, as money properly paid to commissioners and to witnesses for attending upon them, may be taxed against a losing party on a judgment carrying costs, this not being in conflict with the Act of 1827.

There is nothing in our cases, above cited, that warrants the taxation of the costs in question against the Railroad: their bearing is adverse to that conclusion. In the moral aspect there is no doubt the commission to Edgefield was issued in good faith; but it can not be assumed, that the testimony procured was believed to be pertinent and admissible, upon any

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issue made in the record; nor was the testimony in fact received. There is, indeed, a peculiarity in the present case, to wit, that the costs are the plaintiff's attorney's, and compensation to those who procured irrelevant testimony, not costs for a witness attending and actually examined, whose testimony, upon a nice scrutiny, may have been found objectionable.

This plaintiff's claim is rather less favored by the spirit of English adjudication than by our own. See, for example, *Lopes v. De Tastel*, 2 Brod. & Bing. 292 (7 Eng. Com. L. R. 441). The action was against agent for misfeasance, count for trover also with allegation of special damage: plaintiff failed except upon the naked count in trover; the count, in banc, disallowed the claim for costs on any part of the pleadings but the bare count in trover; and this, though the plaintiff urged that the whole declaration was bona fide, framed with a view to trial, and that witnesses attended in support of every part: and insisted especially upon costs for evidence adduced as to special damage, since that was part of the count in trover which was sustained by the verdict, excluding special damage. So in *Severn v. Olive*, 2 Brod. & Bing. 72, (7 Eng. Com. L. R. 353) the expense of experiments necessary to afford evidence on a point in dispute, and new to scientific men, and resorted to by both parties, was not allowed as tax costs for the party prevailing. It was, however, ruled in *Rushworth v. Wilson*, 1 Barn. & Cress. 267, (8 Eng. Com. L. R. 73) that where there is reasonable ground for supposing that the evidence of a witness will be admissible the master may allow his expenses as tax costs against the other party.

The testimony now in question was not objected to when the commission issued: it is the better practice to make the objection then; for it is not unfrequent for some of this court, at least, to hold upon circuit, that where the whole ground of competency and the reverse can be surveyed, the objections, which can be then intelligently made, should be filed when the commission goes. It may save expense and complaint of surprise.

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The motion is granted ; and it is ordered that the taxation of costs be reformed so as to exclude thirty-eight dollars and fifty-six cents, the amount of costs and expense on the commission in question, from the aggregate taxed against the defendant.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ.
concurred.

Motion granted.

Screven vs. Gregorie.

JOHN H. SCREVEN vs. JOHN W. GREGORIE.

Right of way claimed by necessity. The evidence showed that though the way was a great convenience to the plaintiff, there was no actual necessity for it, as he had another way:—Nonsuit ordered on circuit, which the Court of Appeals refused to set aside.

BEFORE WARDLAW, J., AT BEAUFORT FALL TERM, 1854,

The report of his Honor, the presiding Judge, is as follows :

“ Case for obstruction of a private way.

“ The plaintiff alleged a right of way through the defendant's plantation called ‘ Richfield,’ from the plaintiff's plantation called ‘ Castlehill,’ to a tract of pine land owned by the plaintiff, and by him considered as a necessary appurtenance of ‘ Castlehill.’

“ The case shown by the evidence was as follows :

“ Public highways cross at Pocatigo. Castlehill lies in the angle between the Northern and the Eastern roads : ‘ Richfield’ lies west of the Northern end of ‘ Castlehill,’ and is separated from it by the northern road : the plaintiff's tract of pine land lies west of ‘ Richfield ;’ a corner of it is touched by the western road, and a fork of that road passes through it. A gate from ‘ Richfield’ opens upon the northern road, opposite to the upper end of ‘ Castlehill,’ and opposite to the entrance of a much travelled path, which leads from the union road, east of ‘ Castlehill,’ into the northern road. Through this gate a way passes into, and through ‘ Richfield,’ through the plaintiff's pine land, and across the fork of the public road therein, and through other lands into the western road, and toward McPhersonville, cutting off an angle which is made by going down the northern road to Pocatigo, and thence up the western road to

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the point where this way meets the latter road, and so shortening the distance from the gate to that point by two or three miles. The plaintiff's northern avenue, leading from the northern road to the mansion at 'Castlehill,' is half a mile south of the gate; his southern avenue, another half mile more to the south. The distance from the northern avenue to the pine land, through 'Richfield,' is one and a half mile, or more, less than from the southern avenue by the public roads through Pocatigo—the former being the better way in dry weather, and the latter in wet. 'Castlehill' has very little timber, and the most convenient supply for it may be drawn from that part of the pine land which is penetrated by the way, through 'Richfield.'

"Forty years ago, the way through 'Richfield' was open and well trodden. 'Castlehill,' 'Richfield,' and the pine land then belonged to different owners. Soon afterwards they were all acquired and occupied by Gen. Cuthbert, in whom there was unity of possessions until 1826, when he died. The three tracts were then held in severalty, by three of his sons until 1829, when they were again united in Col. James Cuthbert, who held them until his death, in 1838, and in his executors, who held them until the year 1844. These executors sold the tracts separately in 1844; and after some intermediate conveyances, they were again, in 1844, united in James Cuthbert, Junior, who held also a plantation, adjoining 'Richfield,' called Bethel. Before 1849, James Cuthbert, Jr., sold to Elliot, Bethel and an undivided interest in the pine land—the latter tract being in the whole 800 acres or more. A deed dated Dec. 13, 1849, made by James Cuthbert, Jun., in consideration of \$18,000, conveyed to the plaintiff 'Castlehill,' and an undivided moiety of the pine-land, without mention of the intervening way, and without any words showing a connexion between the two tracts.—In 1850, at the request of James Cuthbert, Jun., a surveyor made partition of the pine land so as to annex about 100 acres of it to 'Richfield,' and to divide

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the remainder between Elliott and the plaintiff; assigning to the plaintiff by direction of James Cuthbert, Jun.; that portion which is nearer to 'Castlehill' by the way through 'Richfield,' but more remote by the public roads through Pocatigo. James Cuthbert, Junior, died in 1852: his executor sold and conveyed to the defendant, 'Richfield' and its appurtenances, without reservation: and in 1853, the defendant obstructed the way.

"Until the obstruction, the way in question was at pleasure used for the convenience of all the adjoining plantations;—for 'Castlehill' and 'Richfield,' from a time [beyond which the memory of witnesses does not extend; and for Bethel, from the time that James Cuthbert, Jun., became owner.—It was travelled by all persons who desired to go through—mainly by persons going from the Union road to McPhersonville; some obtained permission, others did not, but before the sale to the plaintiff, the expression of James Cuthbert, Jun., had been that he was willing for his friends to use the way, so long as they would accept it as a courtesy and set up no right. The plaintiff used the way without asking, and with the knowledge of James Cuthbert, Jun., and of his executor. There was a claim of right on his part, and an acquiescence on theirs, but no conveyance or agreement on the subject. The price he paid was thought to be excessive for 'Castlehill' without an appurtenant pine land.

Upon argument made on a motion for non suit, it seemed to me,

That there could be no right of way by necessity, as the highways afforded access to both the defendant's tracts:

That there could be no right by prescription, as except for short periods, there had during the use, been unity of possessions—

That no express grant could be shown by parol, and

That no implied grant rose from the disposition made, or use enjoyed by the former owner; because a way is not one of

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those continuous and apparent easements to which a grant may be thus implied. A careful inspection of both of the plaintiff's tracts might not have disclosed the existence of a way in other land appurtenant to either of them. The exercise of the right required for every occasion the intervention of human will and action. Its convenience gave to the way, only the same legal incidents, which, upon severance of tenements that had been held together, attach to a mill or other fixture for agricultural purposes that had been put by the former owner upon one of the tenements for the common advantage of all.

"I ordered a nonsuit, with leave for the plaintiff to move to set it aside."

The plaintiff appealed on the grounds:

First.—Because it is respectfully submitted that his Honor erred in ruling that the plaintiff had not established by evidence, a right of way over the defendant's close.

Second.—Because his Honor erred in ruling that the plaintiff had not shown a necessary way over the defendant's close.

Third.—Because the ruling of his Honor was in other respects contrary to law.

Ficking, for appellant.

Hutson, contra.

The opinion of the Court was delivered by

WHITNER, J. In the argument, plaintiff's counsel rested his motion entirely on his second ground of appeal. In this he alleges there was error in the Circuit Judge in ruling that the plaintiff had not shewn a necessary way over defendant's close.

Screven vs. Gregorie.

The point raised will be much simplified by putting out of view all the facts in proof anterior to the severance by James Cuthbert, Jr. ; for though there may have been "an open and well trodden path through Richfield the preceding forty years," this cannot change the principles on which the proposition rests.

Unity of ownership extinguishes all such easements, notwithstanding expressions occur occasionally in some of the cases as though ways of necessity formed exceptions. It cannot well be said that one has a right of way over his own soil. The very definition of an easement shews it to be a privilege which one has over the tenement of another, so that when one purchases the land over which he has the way, the soil being his own, the mere appendancy is extinct. Hence in Gales & What. on Easements, 84, I find the doctrine "It is clearly settled, on all the authorities, that during the unity, no way or easement can exist in the land;" sustained by Cro. Jac. 179 ; 2 Bing. 83, and other cases cited.

Having an eye to the state of things in 1849, disclosed in the report, and as though no road had ever existed, regarding the localities of these lands and the existing highways whereby access is afforded from the pine land to Castlehill, can the road in question be at all said to be a thing of necessity, and hence an incident to the grant ; that in fact the grant itself would otherwise be inoperative ? It is urged, however, that such a test would be entirely too stringent, and that when one thus aliens, every thing necessary to a convenient enjoyment is included. To set forth in precise terms to meet every supposed case what shall constitute a way of necessity, would be no easy task. Neither elementary writers or adjudged cases to which I have had access, furnish a rule of service to plaintiff. In the very excellent treatise already referred to, of Gales & What. 71, such easements are classed as "incident to some act of the owners of the dominant and servient tenements, without which the *intention* of the parties to the severance *cannot be carried into*

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effect." They refer to 1 Wms. Saund. 323; Hob. 234; 2 Rolle, Abr. Tit. Grant, T. The general rule stated by Sergeant Williams in the first authority above cited, well illustrates the necessity. "Where a man having a close surrounded with his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land as incident to the grant, for without it he cannot derive any benefit from the grant." Nott, J., in *Lawton vs. Rivers*, 2 McC. 447, adopts and illustrates this rule very fully. Where such right exists, difficulties may arise in the precise mode of laying out the way, but to establish the right the necessity must be shewn. "There must be an actual necessity, and not a mere inconvenience, to entitle a person to such right." The same Judge adds, however, that "it is not meant to say there must be an absolute and irresistible necessity; an inconvenience may be so great as to amount to that kind of necessity which the law requires." The facts of that case, in which the way was denied, will well compare with this in negating the idea of a legal necessity here.

Parol understandings could in no way affect the right in question, and comment on the ungraciousness of the demand or the denial, as the case may be, would be fruitless. We are constrained to say that on the facts of this case, the plaintiff is not entitled to a right of way over the land of defendant from necessity.

The motion to set aside nonsuit is refused.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion refused.

Keep vs. Leckie.

HENRY KEEP vs. ROBERT LECKIE.

A judgment may be confessed though no suit be, in fact, pending.

A confession is valid though the judgment is not to be entered up except upon the happening of a contingency.

The judgment was confessed during vacation. After the next term the contingency happened upon which plaintiff was to have the right to enter it up. Shortly after the happening of the contingency the defendant died, and then the plaintiff entered up the judgment:—*Held*, that the proceedings were regular and the judgment valid, notwithstanding the 10th Rule of Court, and the death of the defendant.

BEFORE WARDLAW, J., AT CHARLESTON, SPRING TERM,
1854.

This was an application, by a creditor of defendant, to set aside the judgment entered in this case on the 31st August, 1852, upon a *cognovit*, signed the 29th November, 1851. October Term, 1851, had passed when the *cognovit* was signed; and March Term, 1852, passed without further proceeding.

The motion was heard upon the following case stated:

“Robert Leckie, the defendant, confessed judgment in this case upon the back of a declaration, upon a note for five thousand five hundred dollars, dated 28th November, 1851, payable on demand, in these words: “I appear in proper person, waive all errors and confess judgment for five thousand and five hundred dollars, this 29th day of November, A. D., 1851.” (Signed) “Robert Leckie.” At the same time there was endorsed upon the sheet of paper in which this judgment was enclosed, the following memorandum:

“The written confession of judgment has been given by Mr. Robert Leckie, the defendant therein, for the purpose of securing the payment of his four promissory notes, drawn in favour of Henry Keep, assignee of Charles King, each note

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bearing the same date as this memorandum of agreement, and each being for the sum of thirteen hundred and seventy-five dollars. The first becoming due six months from date; the second, ten months from date; the third, fourteen months from date; and the fourth, eighteen months from date; it being mutually understood and agreed, that this judgment is not to be entered up except on default of payment of either of the above notes, and is now placed in the hands of Mr. E. W. Bancroft, (to be retained by him,) as the mutual depository of both parties, until the happening of the above contingency; or in the event of all the above notes being fully paid and liquidated as they respectively become due, these papers to be delivered to Mr. Robert Leckie. Witness our hands this 29th day of November, A. D., 1851.'

"The confession of judgment with this endorsement, was then delivered to E. W. Bancroft, who gave a receipt therefor, endorsed upon a copy of the said memorandum, as follows: 'Received, Charleston, So. Ca., the 29th day of November, A. D., 1851, of Messrs. Northrop and Allemong, and of Mr. Robert Leckie, a confession of judgment made by Mr. Robert Leckie to Mr. Henry Keep, assignee of Charles King, which I engage to hold, on the terms of the within copy memorandum of agreement, the original of which is endorsed on the sheet of paper in which the original judgment is enclosed; and I hereby promise to deliver the same to Messrs. Northrop and Allemong, on being notified by them, that either of the notes within referred to is due and unpaid; or in case I receive no such notice, I will deliver the same to Mr. Robert Leckie, on being assured by Messrs. Northrop and Allemong, that the said notes have been paid. (Signed) E. W. Bancroft.'

"The confession, with this endorsement, was folded within a paper or envelope, upon which was endorsed in Mr. Allemong's handwriting, as follows: '*Keep vs. Leckie*; Mr. Robert Leckie hereby agrees to renew the within judgment whenever

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thereunto requested by Messrs. Northrop and Allemong, attorneys of Mr. Keep. (Signed) Robert Leekie.'

"Then follows this endorsement: 'This envelope, with proceedings in *Keep vs. Robert Leekie* enclosed, was delivered by Mr. E. W. Bancroft to Mr. A. Allemong, 31st August, 1852, and by me opened, and the envelope handed to D. Horlbeck, Esq., C. C. P., same day by Wm. Jervy. (Signed) C. B. Northrop. 31st August, 1852.'

"That the first note became due on the first day of June, 1852, but before that day, to wit., on the 25th May, 1852, the said Robert Leekie called upon Messrs. Northrop and Allemong and paid, on account of the said note, the sum of nine hundred dollars, and engaged to pay the balance of the said note on the fourteenth day of June, 1852, but on that day the said Robert Leekie died suddenly without paying the said balance."

His Honor ordered the judgment set aside; and the plaintiff appealed.

Memminger, for appellant.

McCrady, Petigru, contra.

The opinion of the Court was delivered by

WHITNER, J. The facts will be readily collected from the report of the Judge and the accompanying statement of counsel. It is a proceeding familiarly known as a confession of judgment before an attorney, and the appeal leads to an inquiry, whether the order on circuit setting aside the judgment entered was authorized.

Various objections have been suggested and earnestly pressed in the argument, presenting questions I concede not free from difficulty, yet unless fully sustained on just legal views, the subsisting judgment should not be disturbed. This judgment

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encounters, (1) a denial that there was any *cognovit actionem*; (2) that a term having intervened between the signing the alleged *cognovit* and entering the judgment, it was void under the tenth Rule of Court: (3) that the death of the defendant, especially when taken in connection with the foregoing, interposed an insuperable bar to the subsequent proceeding; (4) that the annexed condition and attendant circumstances, made it equivalent to a confession under warrant of attorney.

In the examination of a case involving some of the principles now under discussion, Lord Kenyon, more than half a century ago, declared, that if they were then to consider for the *first time*, whether legal relations and legal fictions *should be* adopted, they would inquire into all and sift most minutely the foundations on which they could be supported, but that then sitting as a Court of Law at the close of the eighteenth century, it was too late to consider whether that, which had always been considered as law, should continue to be so then.

In following the course of argument I have attempted, though I confess with little profit, to trace the distinctions and analogies in the ancient proceedings to judgment, whether on a *cognovit* or a warrant of attorney. The rules which obtained in the different Courts of K. B., Common Pleas and Exchequer, with various modifications introduced from time to time by statutory provisions, involve the subject in much complexity. As sources whence to deduce principles applicable to our forms and practice, they may not be regarded as invariably reliable.

A *cognovit actionem* is a written confession of the cause of action subscribed by the defendant, as is said (Chit. Genl. Prac. 664,) when a "writ has been already issued," or (Lush's Law Prac. 713,) "must be founded on a pending suit." In this case it is insisted there was no *suit pending* or *writ* already *issued*. In English practice, as contradistinguished, a warrant of attorney was an authority under seal to a certain attorney, to confess the action or suffer a judgment by *nil*

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dicat or otherwise, more frequently given independently of any action, and very generally as a prospective security, even though at the time executed nothing is due from the party. Chit. Gen. Prac. 670. Again, the *cognovit* authorized the plaintiff to sign judgment, and issue execution for a named sum, and was a usual mode to save expenses of further proceedings in action, though, when no writ has been issued, the more usual security having the same effect is a warrant of attorney. But by our A. A. 1785, (2 Stat. 282,) all powers of attorney for confessing judgment *before action brought*, are utterly null and void. Hence the distinction has not been preserved, if in fact it ever obtained here. The objection not only reaches a large class of cases, but would unsettle a practice which has taken deep root, and is now inveterate. But the reason of any just rule on the subject, is so fully met by the daily practice, as to obviate all objection. The root of the action from which all subsequent proceedings spring, is the writ. It is designed to summon or bring the party into court, to hear and answer the plaintiff's claim. It is simply on the principle, that no man should be condemned unheard. Certain forms are to be observed ordinarily, before the party can be called to answer, but assuredly it does not hence follow, that they are each indispensable, if the party for whose benefit they are designed chooses to waive them.

The action is as well commenced by the written acknowledgment of service, as though the writ had been served by the sheriff. Irregularities are cured by the act of the party,—sometimes expressed—often by implication. In this case there was a writ tested before the confession, a sufficient undertaking to appear, an actual appearance in person and in terms, and although it is said to have been the constant practice in the Common Pleas to take *cognovit* before declaration and judgment have been entered thereon, (1 Tidd. Prac. 559,) in this case plaintiff's *cause of action* was fully set out in the form of a declaration, and a confession *of the cause of action* duly

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signed. Treated and understood as a suit commenced, and in contemplation of law a suit pending, with a distinct waiver of objections to all matters of form; the objection, to be fatal to the judgment, must be one of substance. Lush's Prac. 328-333.

It is reasonable and expedient when a party defendant has no merits, to save expense by a confession. The law permits immediate adjustment by a debtor, or as has been quaintly said, to "meet his adversary by the way."

The tenth Rule of Court provides, that parties are at liberty to enter judgment obtained at one term or court on or before the last day of the court or term next succeeding, without the payment of additional fees, and that no judgment shall be entered up after such second term, without giving a term's notice to the adverse party or his attorney, of the intention to enter up the same. Mil. Comp. 34. The objection then is, that the judgment in question should have been entered on or before the last day of the term next succeeding the signing the *cognovit*. To this there is a short and conclusive answer, arising out of the inquiry, when was the proper time for entering this judgment. If no terms are imposed, the party may immediately sign final judgment and take out execution thereon. But when a judgment is confessed upon terms, the Court is bound to take notice of it and see the terms performed. Tidd's Prac. 560.

Cotemporaneously with the *cognovit*, and as part of it substantially, were stipulations postponing the day at which the judgment was to be entered. Terms are not unusual, certainly not fatal: such as, stay of execution, stay of lodgment of *fi. fa.*, or entering of judgment.

Until default there was no right in plaintiff to enter his judgment. The day when this contingency could happen was subsequent to the term next succeeding. Hence the rule is no bar, for by no fiction could this be regarded as a judgment of the October Term, 1851. Whether the rule applies to *cog-*

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novit actionem has not been held by our courts,—but the reason of the rule certainly does not apply to the case made, as there was no default until after March Term, 1852, and a judgment entered before would have been set aside.

Books of Practice have it that *the form* is to enter judgment *when default* is made, not when acknowledgment is made. The *cognovit* therefore, must be held to take date when the default is made.

I am thus led to inquire whether the death of the defendant between the judgment Term and the actual entering the judgment, vitiates the record. By our A. A. 1785, (7 Stat. 231, Sect. 41,) in cases of death of party pending suit after an interlocutory and before final judgment obtained therein, provision is made against abatement, and directs a *sci. fa.*, whereupon the action may proceed, and in all actions in any of the Courts of this State, if either party shall die between the verdict and judgment, there shall be no abatement of such actions, but the same shall proceed as if both parties were living. It has been held that judgment signed upon assessment by the clerk at preceding term, was regular; *Miller and Leckie vs. Jones*, 2 Speer, 815; and that there was no abatement or occasion for *sci. fa.* where decree had been rendered under like circumstances. *Dibble vs. Taylor*, 2 Speer, 308. The views presented in these cases will be found illustrative of principles now acted upon.

All judgments are entered as of some term of the Court, and hence judgments confessed in vacation are entered as of the term precedent. Thus too, it has been held, that a judgment signed in any part of the subsequent vacation, relates to the first day of the term, notwithstanding the death of the defendant before judgment actually signed.

I confess on this point of the case I have felt more embarrassment than my brethren, though I have yielded to what I believe the weight of authority, and perhaps the just application of analogous principles long settled, not a little fortified

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by concessions, at least by one of the learned counsel in the argument. The occasion will not permit an extended notice of each case and the point ruled. The authorities directly pertinent will be found, 1 Salk. 87; 2 Str. 881; 2 Taunt. 68; 2 Ld. Ray. 766, 850; 6 T. R. 368; 7 T. R. 20; 15 Eng. C. L. R. 343.

Much of the perplexity vanishes by considering the case of an ordinary confession in vacation disembarassed of all other objections.

A judgment is the conclusion of law upon facts found or admitted. The entry is merely the formal registry of what was adjudged, having relation, as all agree, to the Term when the conclusion is supposed to have been entered. Why or how can the death interpose to arrest the mere formula of entering it up. If the party lives there is no judicial action requisite. No order by the Court in point of fact. There is nothing interlocutory or inchoate. No verdict necessary, the facts are admitted. No assessment required, the sum is ascertained, and by consent is considered as adjudged. The whole proceeding by our practice is begun, prosecuted and perfected in vacation, and the whole fiction is exploded if the entry does not follow as a legal corollary. The defendant is excluded, and the plaintiff cannot be postponed by the mere withdrawal of his assent, however bitter the penitence of the defendant. Continued assent is not of the essence of the right to sign judgment.

I have but little to add on the remaining point, as many of the considerations entering into this have already been presented. It is true, that should not be permitted by indirection which may not be done directly.

The terms of the statute rendering void all powers of attorney for confessing judgment *before action brought*, have been already referred to. Neither in letter nor in spirit is it perceived that this case falls within the purview of the evils provided against. A *cognovit* has been given with a condition

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that judgment should not be entered unless default should be made in the payment on a day fixed. Nothing remained uncertain. Nothing to be adjudged. The mere deposit of the proceeding in the custody of a mutual friend until the contingency, when the judgment was to be signed, cannot change it. There was no discretion to be exercised. No control reserved to the parties. Authorities heretofore cited, prove incontestibly that such terms are competent. The rights of creditors are in no way impugned. An immediate judgment with a stay of levy of execution would have been clearly competent. To them the terms obtained on the part of the debtor were more favorable.

The motion to set aside the order on circuit is granted.

O'NEALL, WITHERS, GLOVER and MUNRO, JJ., concurred.

WARDLAW, J., dissenting. The result which has been attained in this case, seems to me to be dangerous. By fiction of law a judgment is established against the estate of a deceased person, with all the precedence and immediate enforcibility that pertain to judgments which subsisted against him at his death, when in fact, at his death, there was not to be found in the records of the Court, a trace of even a suit commenced against him: and this is done by force of a *cognovit* signed before the beginning of a term which preceded his death. I cannot deny that a judgment entered in vacation has relation to the term next preceding its entry, being but the formal registration in vacation of what was adjudged by the Court. Nor can I deny that a *cognovit* is a present acknowledgment of a previous act of the Court conformable to it; and so, although no suit may be actually pending, authorizes the fiction of a suit pending, and waives all objections to the entry of defendant's formal appearance, and to everything else which is necessary to give the record the form of an action confessed,

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just as if the *cognovit* had been signed in a suit actually at issue. If a *cognovit* be without date, I will not say that the plaintiff's attorney may not, at any time afterwards during the life of the defendant, enter judgment upon it, entitling the judgment as of the term next preceding the entry. But when a *cognovit* is dated of a day in vacation, it is a confession of what was adjudged in a suit supposed to have been pending at the term next preceding the date, and the entry of judgment must regularly have relation to that term.

I think that the tenth Rule of Court applies to judgments confessed not less than to those actually given by the Court. Every judgment is the act of the Court and must be obtained in Court. The fiction founded on defendant's implied waiver of objection, which, where no suit was actually pending at a preceding term, makes a judgment entered in vacation on a *cognovit*, a judgment of the preceding term, considers the *cognovit* as equal to a judgment by default actually rendered at the preceding term, but it makes it no better, and there is no reason in justice or expediency why the fiction should be better than the truth, or a judgment supposed to have been obtained more effective than one actually obtained.

This *cognovit* was dated "this 29th day of November, A. D., 1851," and on its face shows no terms nor conditions. If nothing more appeared, I would then be of opinion that judgment on it could not be entered after the end of the term next following the vacation in which it was signed, that is, after March Term, 1852.

But the *cognovit* was written upon the back of a blank sheet of paper, folded like a declaration, and that sheet was enclosed within another sheet that was sealed, and on the outside of that other was written the agreement. This agreement shows that the *cognovit* was intended to secure the payment of four notes, that judgment was not to be entered until default in the payment of either of those notes had been made, and that Mr. Bancroft, as the mutual depository of the parties was to hold

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the *cognovit* until the default, or until all the notes had been paid, and then was to deliver it to the one or the other party according to the event.

I conceive that this agreement contains the consent of the defendant to waive the rule of Court, or, in other words, his consent to be considered at any time afterwards when judgment might be entered according to the agreement, as having received the notice required by the rule. I think that on the first day of June, 1852, when default occurred, Mr. Bancroft might have delivered the *cognovit* to the plaintiff's attorney, and the attorney might *nunc pro tunc* have entered judgment entitled of October Term, 1851. But the defendant died before Mr. Bancroft yielded possession of the *cognovit*, and of course before judgment was entered. The continuing consent which the agreement contained during the life of the defendant, I think was arrested by his death. Thereupon, the case, when presented to the clerk for entry of judgment *nunc pro tunc*, by consent, was in the same condition it would have been in, if, after notice and before an order, the defendant had died; that is just as if the judgment had been by default, had been rendered at October Term, 1851, had not been entered before or during the next term, and notice of intention to enter it had been given June 1, 1852, but before the order which would have been requisite could be obtained at October Term, 1852, the defendant had died. Possibly when this judgment was entered, good cause existed why it should not be entered; possibly no default then existed, as the defendant, if alive, could have shown to the satisfaction of the mutual depository; the clerk after the death of the defendant had no right to assume that there was no cause, as in his lifetime may have been assumed for his failure to object; and the depository could not then, by this act, make the acknowledgment of default, which he was authorized to make for the defendant whilst he lived.

In the case of *Calvert vs. Tomlin*, (5 Bing. 1; 15 Eng. C. L. R. 343,) the *cognovit* was signed in Hilary Term; the con-

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dition was, "that no judgment should be entered up, or execution issue, unless default were made in payment the 1st April next," the death of the defendant on 16th February, and the default on the 1st April, both occurred before the beginning of the next term, and so also did the entry of judgment on 10th of April. Under the fiction which makes a judgment entered in vacation have relation to the first day of the preceding term, the entry of judgment, notwithstanding the death of the defendant was held regular. GASELEE, J., remarks, that "the plaintiff does not want the authority of the Court to enter up judgment, which follows, as of course, upon the *cognovit*," and BURROUGH, J., saying, that "the intent of the parties was, that at all events, judgment should be entered up, although time was to be allowed for the payment of the debt." In the case before us, however, it appears that, under our rule of court, the authority of the court, or the equivalent assent of the defendant, was wanted by the plaintiff; and the intent of the parties plainly was, not that a judgment should be entered at all events, but was, that it should be entered only after an act to be done by Mr. Bancroft, when a contingency had occurred. If this *cognovit* had been left in the hands of the plaintiff's attorney, and the default had occurred whilst, under the rule of court, judgment might have been entered, of course, without notice, I admit that the previous death of the defendant would not have affected the regularity of the judgment.

But the judgment not entered until August, 1852, has been entitled of March Term, 1852. This is an inconsistency in form. The record says, that the defendant came and confessed at March Term, whereupon the Court adjudged against him, whereas the date of the *cognovit* coupled with the fiction of relation, shows that the Court gave judgment against him at October Term, 1851. If the entry as of March Term is correct, then the *cognovit* was not a present acknowledgment of a matter past in a pending suit, but was a prospective arrangement for a future suit, in other words, it was a warrant

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of attorney to confess, and not a *cognovit*. What difference is there between giving to Mr. Bancroft a warrant to confess, and giving to him a paper signed by the defendant, which, according to future events, might or might not become a confession of the same effect as if it had been signed at some future day. The long approved legislation of 1785, (7 Stat. 232, § 42,) has to very little effect annulled all powers of attorney for confessing judgment before action brought, if the purpose of such a power may be answered by a trifling change of form.

In England, the courts will not give leave to enter judgment on a warrant of attorney, after the defendant's death, even though it were so stipulated in the warrant ; (2 Ad. & El. 365,) to the entry of a judgment on *cognovit*, affidavits preventive of frauds are there required ; and by statute such judgment cannot be signed after the death of a sole defendant. Good policy, which dictated both these regulations and our Act of 1785, should, I think, in this case prevent our rule of court from being dispensed with by the presumed assent of a deceased defendant.

Motion granted.

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NORTH-EASTERN RAILROAD COMPANY *vs.* JOSIAH PAYNE.SAME *vs.* S. G. BARKER.

The charter of a railroad company authorized them to construct their road "from Charleston," &c.:—*Held*, that the company had no authority to enter the city, but that the boundary of the city was the *terminus a quo*.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING
TERM, 1853.

THE report of his Honor, the presiding Judge, is as follows :

"The question in these cases arose on the return of rules issued at the instance of the North-Eastern Railroad Company to property holders on their line of road, to show cause why their land should not be assessed by commissioners appointed for that purpose, according to the Act, and conveyed to the use of the Company. All those, on whom the rules were served, with the exception of the appellants, acquiesced and joined in the appointment of commissioners. Messrs. Payne and Barker resisted the appointment; on the ground that their lands lie within the city, and that the charter of this Company does not provide for their entrance into Charleston, relying, first, on the force and signification of the words 'from Charleston to,' &c., as used in the charter; and, secondly, that no corporation or person can build a road into the City of Charleston, without the consent of the City Council being first had. I overruled their objections, being of opinion that, whatever conclusion may be derived from a strict construction of the charter, justice and policy demanded a more liberal construction; and that under such a construction, the Railroad Company have full authority to run their road from any point within the city that to them may seem most advantageous."

The respondents appealed on the grounds :

1. Because (it is respectfully submitted) his Honor erred in

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deciding that the charter of the North-Eastern Railroad authorized the company to run their track within the limits of the City of Charleston.

2. Because his Honor erred in deciding that the word *from* the City of Charleston, used in the said charter, can be construed as *from within* the city.

3. Because his Honor erred in holding, that this Company could construct their road within the corporate limits of the City of Charleston, without the consent of the City Council, or without the plainly expressed sanction of the Legislature.

Elliott, Barker, for appellants.

Yeadon, contra.

The opinion of the Court was delivered by

GLOVER, J. In considering the first objection interposed by the appellants to the appointment of commissioners, we must ascertain the intention of the Legislature, defining the southern *terminus* of the North-Eastern Railroad. The fifth section of the Act incorporating the company, (12 Stat. 129,) provides that the road shall be constructed "from Charleston, or from any point on the east bank of the Cooper river, within three miles of Charleston, to such point on or near the Wilmington and Manchester Railroad, west of the Great Pee Dee, as may be selected," &c. The appellants contend, that "from Charleston," restricts the southern *terminus* to the corporate boundary of the city. On the other side it is argued, that the words are not exclusive, and that the Company is authorized to commence their road at any point within the city. The commencement of a traveller's journey may, as was suggested, be referred to some point within the corporate limits, but when the Legislature authorizes and directs that a road shall be made "from Charleston," the boundary of the city is indicated as the *terminus a quo*. For the public convenience, streets and ways

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are provided by the corporation, and within their jurisdiction the extension of the road is superseded. When it is proposed to extend a railroad within the corporate limits of a city or town, the intention to do so is not left to conjecture, as in the Statute 6 and 7 Wil. IV., ch. 106, where the Eastern Counties' Railway Company are empowered to make a road, commencing in London and ending in, at or near Norwich and Great Yarmouth. Unless the Legislature had, by a late Act (December, 1854,) granted to the North-Eastern Railroad Company the right to extend their road to the appellants' land, (which, in the opinion of this Court, they could not do under the fifth section of the Act of 1851,) some embarrassment may have ensued; but such considerations cannot aid or influence the Court in the construction of charters conferring large and important powers, affecting both the public and individuals. Corporations will be protected in the exercise and enjoyment of their chartered rights, and must be restrained in the unauthorized extension or abuse of the powers delegated to them. Speaking of their powers, duties and liabilities, Lord Eldon says, "I apprehend that those who come for these acts of Parliament, do in effect undertake, that they shall do and submit to whatever the Legislature empowers or compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are thereby required to do and forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." (1 Myl. & K. 162.)

We are of opinion that the fifth section of the Act of 1851, confines the *terminus* of the North-Eastern Railroad "from Charleston" to the corporate boundaries of the city, and that the appellants showed sufficient cause against the appointment of commissioners to assess their lands.

Motion granted.

WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion granted.

City Council vs. Gadsden.

THE CITY COUNCIL OF CHARLESTON vs. THOMAS N. GADSDEN.

Special verdict and *venire facias de novo* awarded by the Court of Appeals—the verdict finding no fact from which a legal conclusion as to the guilt of the defendant could be deduced.

IN THE CITY COURT OF CHARLESTON, JULY TERM, 1853.

In this case the jury found the following special verdict :

We find that the defendant, Thomas N. Gadsden, is a broker, residing in the city of Charleston ; and that his place of business is at the corner of Chalmers and State streets. That the said Thomas N. Gadsden, as a part of his business, is engaged in the purchase and sale of negroes. That he provides shelter, clothing, and food, for such negroes as may be left with him for sale, when the owner or owners so desire, and not unless desired so to do by the owner or owners of such negroes ; and that for such shelter, clothing, and food, when required, he charges a resonable price. That A. Nachmann did place with the said Thomas N. Gadsden a negro for sale—the expenses of sheltering, clothing, and feeding the said negro, while in charge of the said Thomas N. Gadsden, to be paid by the said A. Nachmann ; and after being for some time with the said Thomas N. Gadsden, the said negro was withdrawn. That the said Thomas N. Gadsden, at the time of the withdrawal of the said negro, presented the following statement of expenses :

"Advertising, - - - - -	\$4 90
Board 20 days, at 25 cents, - - -	5 00
Commissions 2½ per cent. on \$525, -	13 12
	<hr/>
	\$23 02
Cryer's fee, - - - - -	1 00
	<hr/>
	\$24 02

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And to this statement is appended the following receipt: "Received from A. Nachmann fifteen dollars in full for this bill, less than my dues, 15th April, 1853. T. N. Gadsden." We further find that the City Council of Charleston, by its ordinance, ratified 20th Nov. 1839, ordained, that "it shall not be lawful for any person or persons to institute or establish any building, lot, or enclosure within the city as a house or place for the reception or accommodation of the slaves of other parties, for entertainment, safe keeping, correction, or sale. And if any person or persons shall institute or establish any such building, lot, or enclosure, for the purpose aforesaid; or shall admit or receive into the same, any slave or slaves belonging to any person or persons, he or they herein offending, shall for each slave so admitted or received into such building, lot, or enclosure, for any purpose contrary to the provisions of this section, forfeit and pay the sum of five hundred dollars." And if it shall be the opinion of the court, that the ordinance of the 20th November, 1839, is constitutional, and under the foregoing facts entitles the plaintiff to recover, we find for the plaintiff five hundred dollars: otherwise we find for the defendant. Oct. 23d, 1853. W. B. Smith, Foreman.

His Honor, the Recorder, made the following order:

"Ordered in this case, upon the special verdict found by the jury, and hereto attached, that judgment be entered for the plaintiff for the sum of five hundred dollars, and costs. Oct. 28th, 1853. Wm. Rice, Recorder."

And the defendant appealed because:

1. The ordinance of 20th November, 1839, or so much of it as is set forth in the special verdict, is unconstitutional.
2. If constitutional, the verdict finds that the defendant only "provides shelter, clothing, and food, for such negroes as are left with him *for sale*, when the owner or owners so desire;

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and not unless desired to do so, by the owner or owners of such negroes." And this cannot be held illegal under the ordinance of the City Council, without extending its construction, and so qualifying the right, and restricting the mode of selling negroes, as to amount to its prohibition. And this would be beyond the powers belonging to the corporation of the city of Charleston.

3. Because providing "shelter, clothing, and food," for the negro slave of A. Nachman; the said slave having been by his owner placed with the defendant for sale; and the expense thereof to be paid by the owner; is a contract, necessary in most cases, where slaves are to be sold: consistent with that humanity which should be approved, and not forbidden in such cases: and sanctioned by the laws of the State, which consider slaves the subjects of sale, and legalize such contracts as are made for such sales.

Magrath, for the motion.

Porter, contra.

The opinion of the Court was delivered by

MUNRO J. The only question we deem it necessary to consider in this case, is whether the facts set forth in the special verdict, sustain the legal conclusion the Recorder has deduced from them.

The language of the ordinance which the defendant is charged with having violated is as follows: "That it shall not be lawful for any person or persons, to institute or establish any building, lot, or enclosure, within the city, as a house, or place, for the reception, or accommodation of the slaves of other parties, for entertainment, safe keeping, correction or sale," &c.

Let us now look at the special verdict, and see if the jury

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have found the defendant guilty of all or any of the prohibited acts enumerated in this municipal statute.

Instead, then, of its appearing in the special verdict, that the defendant has been guilty of "establishing a building, lot, or enclosure, within the city, as a house or place for the reception or accommodation of the slaves of other parties, &c.," all that we find is, "that the said Thomas N. Gadsden is a broker, residing in the city of Charleston, and that his place of business is at the corner of Chalmers and State streets;" and instead of its further appearing that in the building, lot, or enclosure so erected or established by the defendant in violation of the said ordinance, the said defendant has also been guilty of accommodating the slaves of other persons sent to him for safe keeping or sale, we merely find "that the said Gadsden, as a part of his business is engaged in the purchase and sale of slaves, and provides shelter and clothing for such negroes as may be left with him for sale," &c.; but whether he provides accommodation and entertainment, food and shelter, for said slaves, at his place of business, at the corner of Chalmers and State streets, at his place of residence, at one of the public hotels, or at the workhouse, no where appears upon the face of the verdict.

This being the case then, it is manifest, that there is not a solitary act that has been found by the jury against the defendant, that can in any conceivable point of view, be construed into a violation of this ordinance.

Now, whatever may have been the policy that dictated the ordinance in question—whether it was with the view of prohibiting the setting up of rival establishments to the work house—or, whether it was suggested by the danger that might result from congregating together in private establishments, large gangs of slaves, of vicious characters and depraved habits, and where they might be beyond the reach of municipal supervision, it is not our province to inquire: our province is confined exclusively to the application of the law, as we com-

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prehend it, to the facts of the case, as they have been found by the jury. In the discharge of this duty, we are admonished by a salutary rule of law, that penal statutes are not to be enlarged by construction, but on the contrary, must receive a strict interpretation, so that no man shall be held to incur a penalty, unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing it; for, as was remarked by Ch. J. Best, in the case of *Fletcher v. Saunders*, 3 Bingh. 58, "If this rule be violated, the fate of an accused person is decided by the arbitrary discretion of judges, and not by the express authority of the laws."

Testing the Recorder's judgment by this rule, we are of opinion, that it is not sustained by the facts as found by the special verdict, so that the motion to reverse it must be granted, and that a *venire facias de novo* do issue. And it is so ordered.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion granted.

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THE NORTH-EASTERN RAILROAD COMPANY vs. LAVINIA SINEATH.

On an appeal by the N. E. R. R. Company from the assessment by commissioners of damages sustained by a land-owner in consequence of the location of the road through his land, the jury are not limited to the amount fixed by the commissioners, but may give higher damages.

Damages cannot be assessed by the jury for fencing along the road through unenclosed land used for grazing.

BEFORE FROST, J., AT CHARLESTON, FALL, TERM, 1852.

The Report of his Honor, the presiding Judge, is as follows:

“This was an appeal, by the Railroad Company, from the appraisement, by the Commissioners, of the damages, sustained by the defendant, in consequence of the location of the road through her land. The defendant's land is twelve miles from Charleston, on the State Road to Columbia. The dwelling-house of the defendant was formerly and is still kept as a public house, but has now no custom. The S. C. Railroad passes through her tract of land to the West of the settlement, about half a mile from it, where there is a station. The route of the North-Eastern Railroad is also through her land, about half a mile east of the settlement. The tract consists of three or four parcels, bought by the deceased husband of the defendant, at different times. The road is located so as to extend eight thousand three hundred feet through her land, taking twenty-six acres; and the Commissioners assessed her damage at one thousand four hundred and five dollars. In making this appraisement, the Commissioners estimated the land taken at from six to ten dollars per acre; and the cost of fences, on both sides of the road, along its whole extent, was included in the sum allowed. For a part of the way the road passed through cultivated grounds; but for the greater part it passed

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through woodland. The evidence showed the land to be very poor, and little valuable for cultivation. Its chief value consisted in the timber, which was cut and sent to Charleston for sale. Goose Creek bounded the tract towards the East, and on it there were three landings used for the sending of wood to market. The other chief value of the land consisted in the range it afforded for cattle. From cutting wood and raising stock the defendant derived an income. Some provisions were planted. The stock range was on the creek, and the road passed between the settlement and the creek. The best timbered land was to the west of the road. Thus the road was located between the settlement and the cattle range, and between the wood-land and the landings, to which it had to be hauled. For about one thousand feet, no material change of the surface was made by the track of the road ; but, for the rest of the distance, the road bed would average about four feet in intrenchment and excavation, the highest embankment or deepest excavation being eight feet. The structure of the road would make the hauling of wood to the landings more laborious. Some deep swamps ran up from the creek across the road. If the road was not there, wood could be carted through the pine land directly to the nearest landing. It could be carried over the road only where crossings might be made. These it would be difficult to keep in order. A short distance under the surface quick-sands were said to occur. The cost of hauling wood was from seventy-five cents to one dollar per mile, for a cord. Wood might be sold at the landing from two dollars fifty cents to four dollars per cord. The witnesses estimated variously the increased distance of hauling made necessary by the road. The load would be diminished by the necessity of the ascent, when it was hauled over a high embankment or a deep cut. The South Carolina Railroad did buy some wood at the station on defendant's lands, but their chief supply was brought from above. They would give only one dollar twenty-five to one dollar fifty cents a cord, at the

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station. There was evidence that the South Carolina Railroad had been very destructive of cattle. The *Rev. Mr. Danner* said he could maintain seventy head of cattle on his range, and would have had that number if it were not for the destruction of them by the trains. He said he did not own a cow. The last of his stock, five or ten head, he had sold. The trains had destroyed a great many. He would not say how many, any nearer than that from ten to sixty head had been killed. He said that he had recovered at one time from the South Carolina Railroad Company, three hundred or four hundred dollars. He had been paid for cattle killed at various times. But, for a long time, the company refused to pay; and it cost more to recover the damage, by suit, than the cattle killed were worth. Besides this, payment of the value of the cattle killed was no compensation for the destruction of them. He said he had not butter, nor even milk, now, for the use of his family. This witness had acted as a Commissioner to assess the damages of lands, and had voted for five thousand dollars, while the Commissioners allowed one thousand seven hundred and fifty dollars.

"The *Rev. Mr. Leadbetter* also testified to great destruction of his cattle. He stated only the loss of a ram. He, too, had acted as a Commissioner in Vose's case, and had proposed three thousand dollars, while the commissioners assessed a much less sum.

"*Sims'* place is about thirteen miles from the city. The South Carolina Railroad does considerable damage to a cattle range; many are killed. His range depreciated twenty-five per cent. by the railroad. He has lost his best cows; was paid for one. The cost of recovery exceeds the value of the cattle killed. Stock yields, in annual profit, about twenty-five per cent. on the value of the entire stock. The defendant had about seventy head. Other witnesses could not say how many; but that defendant had a large stock. She had offered to buy a tract of land, where her cattle might range away from the

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railroad. The profits had been much reduced ; but she sold some calves last year. It was further in evidence that a railroad injures timber land by burning up the young growth, and injures a range for cattle by burning the grass and young cane. All the witnesses concurred in saying that the tract of the defendant was valuable for its timber and cattle range, and for little else. *Rhame*, one of the Commissioners, testified that defendant's land was valuable only for its timber and range. The South Carolina Railroad destroyed many cattle. They would go on the track of the road. The grass on the embankment was better than on the land adjoining. Stock raising had to be given up about defendant's. Cattle affords the 'best yield' of the land. One thousand dollars in cattle will yield two hundred and fifty dollars per annum, besides milk and manure. He would not have the road located, as it is, for three thousand dollars. He would give five thousand dollars for defendant's land as it stands. *Traxler* testified that defendant's tract contains between two thousand five hundred and three thousand acres. The several tracts of which it is composed, had cost defendant's husband about seven thousand four hundred dollars. The value had been increased. But he said the railroad was of no advantage to a wood-cutter who had water-carriage to Charleston, and three landings, as the defendant had. The railroad Company gave about one-third of the price which could be obtained for wood at the landings. These three landings are a great advantage to the land ; if cut off, that would be a great disadvantage.

"Prevost, Rhame, Sims, Traxler, Danner, and Leadbetter all testified that a railroad did not increase the value of lands within fifteen or twenty miles of the city. It afforded no facilities for conveying farm produce to market, nor for bringing manure from the city.

"Rhame had sold his place on the South Carolina Railroad because it was an annoyance ; and Danner said he had bought

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his tract cheap, because the seller was dissatisfied with a location on the railroad.

“Messrs. Ferguson, Ravenel and Furman, expressed the opinion that railroads do enhance the value of land. That the effect of a railroad is to increase the population of Charleston, and give increased value to farming lands in its vicinity. Neither of them stated any sales or other facts to show that the South Carolina Railroad had, within fifteen miles of the city, enhanced the value of lands. Ferguson knew Goose Creek Parish by riding over the State Road to his plantation, in St. John’s. Ravenel was also over the State Road to his plantation on the east side of Goose Creek. Furman said that he had been agent for some lands in Goose Creek. One tract of two hundred or three hundred acres had been bought for seven hundred and fifty dollars. He sold this tract to Mr. Waring for the same price, twenty years after the South Carolina Railroad had been constructed within a mile of it. This place is about twelve miles from Charleston. It had been a long time advertised for sale before it was sold to Waring. Waring goes to the place chiefly by the plank road, which has been laid on the State Road, and finished for the distance of seven miles from Charleston. Waring, he supposes, would not now take what he gave for the land.

“The jury were instructed that, by an appeal from the appraisalment of the Commissioners, the valuation was opened as a new question, and that their estimate of benefit or damage must be made according to the evidence submitted to them; and that, as they might find less, they might also find more than the Commissioners had done, although the defendant had not appealed.

“They were further instructed that as the expense of fencing was allowed where the railroad passed through cultivated land, it would be proper to make that allowance if it passed through a grazing farm or a tract of land which was used for the pasturing of cattle.

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“They were further instructed that the increased labor and cost of hauling wood to the landings, which the railroad might create, was a proper subject for the assessment of damages; and so they were instructed would have been the injury to the value of the tract as a cattle range, in consequence of the structure of the road; but that item of damage was merged in the allowance for fencing.

“They were advised that the weight of the evidence tended to the conclusion that the North-Eastern Railroad would not appreciate the value of defendant’s land. And, on this subject, their attention was directed to the fact that the South Carolina Railroad now passed through defendant’s land, and also to other particulars of the evidence.

“It was intimated to them that they should not exceed the appraisement made by the Commissioners, who were persons so well qualified to decide. But they by their verdict increased the assessment to two thousand dollars.”

The Company appealed on the grounds:

1. That there was strong evidence in the nature and facts of the case, as well as from witnesses, that the lands of the owner had appreciated, or must have necessarily appreciated in value, in consequence and anticipation of the projected road; and his Honor erred in charging that the weight of evidence was the other way.

2. That his Honor erred in charging that the Commissioners and the jury were warranted by law in giving the owner compensation for fencing along both sides of the track of the projected road, throughout the whole length of her tract, and not for fencing only of the cultivated land.

3. That his Honor erred in charging that the Commissioners and the jury were bound or at liberty to give conjectural damages for the possible killing of cattle or obstruction of cartage by a railroad not yet built.

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4. That his Honor erred in charging the jury that they were at liberty to surcharge the assessment of the Commissioners.

5. That the verdict of the jury, so far as it surcharged the assessment, was excessive, unwarranted, and unsupported by the evidence, against the acquiescence of the owner and contrary to the charge of the presiding Judge.

6. That the verdict of the jury was in the foregoing and other respects contrary to law and evidence, and the justice of the case.

Martin, Yeadon, for appellants.

Magrath, Pressly, contra.

The opinion of the Court was delivered by

O'NEALL, J. The provision under which the assessment made by the Commissioners, and from which there is an appeal, is the 10th Section of the Charter of the Greenville and Columbia Railroad Company. 11 Stat. 327. That section directs the Commissioners in making the assessment "to take into consideration the loss or damage which may occur to the owner or owners, in consequence of the land or the right of way being taken; and also the benefit or advantage he, she or they may receive from the establishment, or erection of the Railroad and works, and to state particularly the nature and amount of each; and the excess of loss and damage over and above the benefit and advantage shall form the measure of valuation of said land or right of way."

Before considering the question which arises out of this part of the section, it will be necessary to consider and decide a preliminary question arising out of the 4th and 5th grounds of appeal—could the jury assess a higher value than that fixed by the Commissioners? If this was strictly an appeal I should

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not hesitate in saying they could not. But this is not strictly an appeal, although so called by the Act. For, on appealing to the Court at the next session after the valuation, "satisfactory proof must be given that the appellant has been injured by such valuation;" and thereupon the Court is to order a *new valuation* to be made by a jury, who shall be charged therewith.

According to the wording of this part of the section, it would seem that the appeal should be made to the Court, and then if upon a showing by affidavits, or from an examination of the Commissioners' valuation, it should seem that the appellant was injured, the Judge presiding should order an issue to be made up forthwith, so as to charge a jury with the question of injury and benefit to the owner of the land by the location of the Railroad. This the law directs shall be a *new valuation*, and hence there can be no doubt that the Commissioners' previous valuation can be no standard for the jury.

The second ground of appeal makes the only other question, upon which it is deemed important to express an opinion. The Judge below instructed the jury that they might in assessing damages or making a new valuation, allow for fencing along the line of the Railroad through unenclosed lands used for grazing. This instruction was, I think, erroneous: and this I propose showing in as brief a way as possible.

In *Partlow vs. The G. & C. R. R. Co.*, 5 Rich. 428, Judge Frost said in answer to the third ground of appeal, "the expense of fencing along the road, when it passes through fields, is properly an item of damages." It might be enough to say that this *dictum* decides nothing against the appellant; on the contrary its implication seems to favor the conclusion, that it is only when the road runs through fields that fencing would be a proper item. But it really has not and ought not to have any controlling effect on the very matter of which it speaks, further than the respect and weight which is rightfully due to an able Judge, our late esteemed associate. For it was

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a mere *obiter*, notwithstanding it was in answer to a ground of appeal: the case turned upon and was decided on the ground, that the increased saleable value of this land "was a part of the benefit and advantage" to the owner from the location of the road, and must be set off against his damages.

In deciding "what loss or damage may occur to the owner," the jury are not to resort to mere possibilities. The natural or necessary consequences from the location are to be looked at, as the cutting off the owner from a part of his land, the necessity to remove a fence and replace it so as to secure a field, when the road runs upon and opens one side of it, the draining of a well or spring by the excavation, as well as the actual taking and occupation of his soil. But fencing along the whole line on both sides of it, in cultivated or uncultivated, enclosed or unenclosed lands, is neither a natural nor a necessary consequence of the location of a Railroad. When it is located through a field, cattle guards, where it enters and leaves, are all which are either necessary or usual. Fences on both sides would subject the owner to more inconveniences by far than the Railroad. For then he would have his fences to climb or pull down, whenever he wished to pass from one part of his plantation to the other. Such a system of fencing might operate as a pound to gather his cattle for slaughter, by an engine, and to break up and destroy it, and the trains, to the endangering of life and limb of all passing. But in fact fences are not built along Railroads in this State, in even enclosed lands. Persons passing over the G. and C. Railroad, through the very land for which fencing was allowed, in *Partlow's* case, will find that not a solitary rail has been laid alongside the road.

It is argued, however, that to prevent the killing of stock, it is necessary that there should be fences. I have already suggested that instead of protection, it might be the means of destruction. If the questions were new as to the liability of Railroads for such injuries, I should be very much inclined to hold that a Company were not liable for such an injury, unless

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upon clear proof of negligence in running the train. For the charter of a Railroad makes the use of it by a locomotive, just as lawful as the use of a highway by a wagon or coach. Who would suppose that the owner of a wagon or coach was liable for a hog killed by being driven over by the wagoner or coachman, unless negligence was shown? The runner of a locomotive knows very well that he perils his own life, and all who are dependant upon his care, when he runs over a cow or other animal. It is so rare that men are reckless enough to incur such peril designedly, that I think the presumption should be in his favor, and not against him. But in *Danner vs. The South Carolina Railroad Company*, 4 Rich. 334, a different rule was adopted. In that case it was held, that the Company was liable for killing a cow on its track through the land of the plaintiff, unless it could show that such killing was the result of an inevitable accident. This provides ample means of compensation for all such possible injuries, and hence there can be no necessity to allow for fencing to guard against it. Indeed, if the land owner (this appellee) were allowed for fencing to guard against this contingency, and her cattle should hereafter be killed, she would not be allowed to recover for them, *unless killed wilfully*. This, I am sure, is enough to dispose of the argument which we have been considering.

I agree fully with the annotator on *Railway Cases*, (1 *Railway Cases*, 212, note,) that at Common Law the owner of land was not obliged to fence against the cattle of other persons, and that the owner was bound to keep them on his own land. If they went upon the land of another, he (the owner of the cattle) was liable for any damages therefrom resulting, and that, generally, he could not recover for any injuries which unintentionally were inflicted upon them. These principles would not only excuse a Railroad Company from damages for accidentally killing cattle on their track, but might make the owner liable for any damages which the Company might sustain by running over them. For the Company is the owner

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of the track, either in fee or as an easement granted to its exclusive use, and hence, therefore, cattle, generally, could not lawfully be upon it. But in this State, woodland or unenclosed land is regarded very much as common. Every one may hunt over it—cattle may range and pasture on it. This may, therefore, justify the exception carved out by *Danner vs. The South Carolina Railroad Company*.

The obligation to fence depends altogether upon Statute. In this State, to entitle a party to remuneration for cattle trespassing upon his grounds, he must have a fence five feet high. Beyond this, we have no law on the subject. That Act cannot, however, touch this case, and it may therefore be laid down broadly that the Railroad Companies are under no obligation to fence their tracks.

In other States, such obligation has been imposed by law. In Maine the Statute law requires every Railroad Company to erect and maintain sufficient fences on each side of the land taken by them for a Railroad, when it passes through enclosed or improved lands, but there being no such requisition in reference to unenclosed lands, it was held they were under no obligation to fence against them. *Perkins vs. The Eastern Railroad Company*, and *The Boston and Maine Railroad Company*, 1 Railway Cases, 144. That case would be enough for this case, for here the claim is entirely for unenclosed land.

It is very true, that many cases can be found in which fences have been allowed: but they are generally when the Charter of Companies or some general Act has made provision devolving upon them such a burden. So, too, when such decisions have been made, it has been held that no compensation could be made to the owner for an animal killed, unless culpable negligence could be shown in running the road.

In this case we are of opinion that no allowance for fencing can be made, and it would also seem to follow that the possible killing of cattle in any other way than by inevitable accident, ought not to enter into the assessment of damages. For in all

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other cases the Company is liable for such an injury, and the damages as the injury occurs can be recovered.

The motion for a new trial is granted.

WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

WARDLAW, J. I agree that the jury were not limited by the assessment of the Commissioners. I agree that there was error in instructing the jury, that "it would be proper to make the allowance" for fencing. This seems not to have been an opinion founded upon the peculiar circumstances of the case, but to have been the application of a general rule, which it was supposed had been established as to cultivated lands, and which it was thought should in analogy be extended to a grazing farm in forest land. I do not think that any general rule on this subject had the sanction of the Court in *Partlow's* case: and I would find it very difficult to define the circumstances which limit a general rule, so as to allow it for good reasons to embrace cultivated fields, and not for reasons equally good to extend to the immense tracts of pine lands, all grazed upon by cattle, through which Railroads do run or may run in this State. Fencing is, I think, like a bridge over an excavation, or a cattle guard, a matter which by contract a Railroad Company may assume, or which, where no agreement on the subject will be made by the Company, may or may not, according to circumstances, be taken as a measure of certain items of loss or damage in the making of an assessment. By our law, neither the land owner or the Company is bound to fence along the Railroad: the interest which the public may have in the matter has been wholly overlooked. The Company is, therefore, not liable for cattle killed by a train, in all events, as it would be if the killing resulted from its neglect of the duty of fencing imposed upon it, but is liable only for negligence established by presumption or otherwise. The allowance for fencing

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made in an assessment would be only an allowance for the damage which might come from the land owner's cattle being killed, in cases where the killing could not be proved, or where there was no negligence on the part of the Company. It might serve to shift the presumption concerning negligence, where the land owner's cattle had been killed, from the Company against whom it is now raised, to the land owner himself, who would have been paid to keep his cattle from the track: but it would not authorize the wilful or negligent killing of the land owner's own cattle, and could have no effect as to the cattle of other persons. It would give neither the right nor the means for the Company to compel the land owner to make the fences, if he chose to run the risk and bear the burden of presumption which would result from his neglect.

The ultimate question in an assessment is, what is the loss or damage which has been produced or may be produced by the operations of the Company? In one case it may appear that certain inconveniences or risks would be wholly or partially obviated by fencing: the expense of fencing would then be the measure of so much loss as it would obviate. In another case the expense of fencing might greatly exceed the whole value of that portion of a tract which lies on one side of the Railroad, and that value, increased by the depreciating effect, if any, which the cutting off of that portion would leave on the remainder, ought to be the extreme measure of the loss. In one case no security against great danger could exist without a fence; in another, cheap cattle guards would preserve the desired enjoyment of the land. In every case the circumstances should be looked to, and fencing be considered only as a means of estimating the pecuniary extent of the loss.

I concur in the result.

Motion granted.

Peebles vs. Stevens.

THOMAS M. PEEPLES ET AL. vs. JAMES STEVENS AND BARNET
SWEAT, EXECUTORS.

Where executors, who are also legatees, propound a will for probate, their declarations, as well after as before the execution of the will, may be given in evidence by the next of kin.

BEFORE WHITNER, J., AT COLLETON, SPRING TERM, 1853

THIS was an appeal from the decision of the Ordinary, admitting to probate the following paper, propounded as the last will and testament of Elizabeth Matthews, deceased.

"SOUTH CAROLINA, }
 "Colleton District." }

"I, Elizabeth Matthews, widow of Jacob Matthews, do give, devise and bequeath, the whole of my estate, real and personal, of every kind, character and description whatsoever, goods, chattels, moneys, unto Barnard Sweat and James Stevens, to be equally divided between them, for and during their natural lives; and after their deaths, each of their respective portions to such of their children as may be living at the time of their deaths; and that each of them shall pay Mrs. Mary Stevens twenty-five dollars so long as she lives; and I nominate and appoint Barnard Sweat and James Stevens, executors, to this, my last will and testament.

"In witness whereof, I have hereunto set my hand and seal, this first day of January, Anno Domini one thousand eight hundred and fifty-one.

"ELIZABETH ^{her}
 ✕ MATTHEWS, [L. S.]
 _{mark}

Charleston, January, 1855.

"Signed, sealed, published, pronounced and declared by the testatrix, as and for her last will and testament, in our presence.

"JOSEPH J. PERRY,

"R. S. BEDON,

"DANIEL FLUD.

"CODICIL.—Should my two brothers come, I leave each of them twenty dollars, to be paid by my executors.

"ELIZABETH ^{her} X MATTHEWS.
mark

"JOSIAH J. PERRY,

"R. S. BEDON,

"DANIEL FLUD."

The grounds chiefly relied upon by the next of kin were, that the will was procured by the executors by fraud and undue influence, and that the testatrix was not of sound and disposing mind.

Much testimony was given on both sides. In behalf of the next of kin, the declarations of the executors were offered in evidence. His Honor admitted such of them as were made anterior to the execution of the will, and excluded such as were made afterwards.

The jury by their verdict sustained the will.

The next of kin appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor erred in refusing to permit the appellants to offer in evidence the declarations made by the appellees, James Stevens and Barnet Swcat, subsequent to the execution of the alleged will of Elizabeth Matthews.

2. Because his Honor, the presiding Judge, erred in admitting the testimony of John D. Edwards, Esq., in behalf of the appellees, who was one of the attorneys on record, actively

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engaged in sustaining the will up to the time his testimony was offered, and who admitted that he had received a fee of one hundred and seventy-five dollars to establish the will.

3. Because there was not sufficient evidence that in the execution of the will, the forms of law were complied with.

4. Because there was not sufficient evidence that the said Elizabeth Matthews ever gave any instructions for the preparation of the alleged will, or understood what was contained therein.

5. Because the evidence made out a clear case of mental imbecility, and a total want of the *animus testandi* required by law.

6. Because the evidence proved, that the alleged will was obtained from the said Elizabeth Matthews, by the appellees, through fraud and under influence.

7. Because the verdict was, in other respects, contrary to law and the evidence.

Henderson, Carn, Pressly, for appellants.

Petigru, Perry, Buist, contra.

The opinion of the Court was delivered by

O'NEALL, J. The first ground of appeal was alone the subject of re-argument. The other grounds were directed against the verdict, as erroneous in fact. In themselves they would not have constituted a sufficient reason to justify us in sending the case back, although we are far, very far, from being satisfied with the verdict upon the facts of the case.

Looking, therefore, to the first ground of appeal, alone, I shall proceed, with the concurrence of the Judge below, to state

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the reasons why we think his ruling was erroneous. The case of *Dillard vs. Dillard*, 2 Strob. 89, was the reason of the exclusion of the testimony offered. That case does not, when properly understood, at all conflict with the admissions of the declarations of one or both of the executors adverse to the will. In it, it will be seen that the declarations offered were those of a legatee who was not a party to the issue. That I think is such a material distinction as to make that case not authority in this. For it may be that a legatee, not a party, has no such joint interest with the other legatees, as of itself, to make his declarations evidence against them. In such a case, he might have been sworn as a witness. The case of *Gray vs. Gray*, 1 Hill, 38, upon the authority of which my brother Withers decided *Dillard vs. Dillard*, is placed by Judge Johnson expressly upon the ground, that the distributee, whose declarations were offered and rejected, was not a party, and was not competent to be sworn against his interest. It is true, he also says, that his declarations were inadmissible on another ground, that there were other distributees and creditors over whose interests he had no control. But the first was sufficient for the case, and the other was unnecessary. The case of *Durant vs. Ashmore*, 2 Rich. 184, is another illustration of the rule. There the declarations of the executors, plaintiffs in the issue, were received against the will, although they were merely, that "*it was their opinion that the deceased had no will.*" And, on appeal, it was held, that the declarations were properly admitted. The judge delivering the opinion, said "they were from the parties to the cause, and might be used by the adverse party." This short sentence is just as much matter of authority as the most labored opinion. It conforms to the uniform rule, that whatever is said by a party to a cause, if it be at all relevant to the issue, may be used by his adversary as testimony against him. The cases from the Georgia Reports, are full and clear authorities, in cases of the same kind as the present, ruling in conformity to what I have just

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stated. In *Harvey vs. Anderson*, 12 Geo. Rep. 75, Judge Warner states the question, "were the admissions of Anderson, the propounder of the paper offered for probate, the nominated executor therein, and legatee under the same, competent evidence for the consideration of the jury." In answer to this question, he says, "the general rule is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence; and this general rule, admitting the declarations of a party to the record in evidence, applies to *all cases* where the party has *any* interest in the suit, whether others are *joint parties* with him or not, and howsoever that interest may appear, and whatever may be its *relative amount*."

In *Williamson vs. Nabers*, 14 Geo. Rep. 285, the same ruling was repeated. These cases are identical with this. There the declarations were those of the executor, having also an interest as legatee. So in this case, both these executors, propounders of this will, have interest to a large proportion of the estate under the will.

The very argument with which we have been assailed, that an executor, having an interest against a will, might, by his admissions, destroy it, is answered by Judge Warner, in 12 Geo. Rep. 75, by saying, that "no such state of facts is presented by this record." We might repeat the same remark here, for the executors have all the interest which make men struggle to preserve a will. Whenever the extreme case supposed arises, it will be then time enough to decide how far such a state of things may go beyond the credit of the party making them.

The case, in *the matter of Thomas Drayton's will*, 4 McC. 46, was cited, to show that these appellees, who propound the will for probate, are not executors until probate. But that case did not so decide, it was in it held; that if an executor die before probate, his executor cannot prove the will, or take upon himself its execution. In that case, William Henry Drayton, the propounder of the will, and named executor, is

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called by the judge delivering the opinion, *executor*, as he really was by being named, though not having completed his right by perfecting the probate, it did not pass to his executor.

The rule is stated in Williams on Executors, 239. "The probate, however, is merely operative as the authenticated evidence, and not at all as the *foundation of the executor's title, for he derives all his right from the will itself, and the property of the deceased vests in him from the moment of the testator's death.*" The cases of *Taylor vs. Taylor*, 1 Rich. 531, and *Workman vs. Dominick*, 3 Strob. 530, show that the person named as executor in the will is thereby, and from the death of the testator, the executor in fact and law. Otherwise it never would have been held, as it was in *Workman vs. Dominick*, that Hair, the executor named in the will, but who refused to qualify, and who did not present the will for probate, was an incompetent witness to prove its execution.

The appellees *here* may therefore be legally regarded as executors of the paper propounded for probate, having under it a joint interest, and representing all rights and interests of the testatrix and of her legatees. In such a case, I do not perceive how there can be any question as to the admissibility of the declarations of one or both of them against the will which they undertake to set up.

Independent, however, of their joint interest and their joint representation of all claiming under the will, the very fact of presenting together the same paper as a will, and contending together for its probate, is certainly plenary evidence of combination to obtain a common end, and in that point of view the declarations of one would be evidence against both.

The motion for a new trial is granted.

WHITNER and MUNRO, JJ., concurred.

WARDLAW, J. I concur in the result of this case. I do not feel the force of the observation, that the appellees here are

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executors, and therefore representatives of all the legatees. The very question of the case is, whether they are executors. In all testamentary causes like this, the tribunal which tries, no matter what the form of its organization, is in fact a Court of Probates, exercising ecclesiastical jurisdiction; the issue to be decided is whether the instrument propounded has been proved as a will, and upon that depends the question, whether there shall be a grant of probate, that is, a grant of letters testamentary to the executors nominated, if they be the persons propounding the instrument, or grant of administration, *cum testamento anexo*, to the persons entitled thereto in default of executors. These appellees are joint applicants to the Court for the grant of its authority. The next of kin, who are the appellants, resist the grant; if the contest has been properly conducted, the result, affecting the personalty only, will be conclusive upon all the world. Yet there are in this case (and more plainly there may be in other cases of this kind) persons not parties before the Court, who have interests that they would not willingly submit to the wishes of either executors or next of kin.

In the cases where executors nominated have been held incompetent to attest wills, the principle of the decision has been that persons, who, at the time of attestation, are subject to such bias as is supposed to proceed from an interest appearing on the face of the instrument attested, are not, within the pervue of the statutes concerning wills, credible witnesses to attest. The death of any such person, between the attestation and the death of the testator, would not give validity to his attestation; and as a nominated executor who died before the testator could not be said ever to have been executor, nor one whose right is contradicted by the setting aside of the instrument under which he claimed, so should not one whose title is yet *sub judice*. It is said that there has been in this case grant of probate after proof in common form; but that is of no consequence, for upon the result of the trial of proof in

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solemn form, will depend the continuance of the character which the appellees have assumed, and have assumed unjustly, if it shall turn out that the paper propounded is not the will of the testatrix.

I reserve my opinion as to the application to these testamentary causes of the general rules which govern the admissibility of declarations made by a party on the record. If I was required to form an opinion, I would endeavor to examine how far our Acts of Assembly, and decisions concerning the proof of wills, have made the persons nominated as executors of a paper propounded as a will, representatives in Court of all legatees mentioned therein: whether, if made representatives to any extent, the nominated executors are not trustees who would not be permitted to affect injuriously the rights they were appointed to guard, any more than a nominal plaintiff could so affect equitable interest which a suit was brought to establish: whether these nominated executors could compromise a testamentary cause, withdraw a will from examination, or suppress it; and whether there might or might not be distinctions, founded upon sound principles, between their declarations made at different periods, and also between their declarations and those of other persons who, as distributees or next of kin, might also be parties on the record.

I agree, however, that the admissions of a party who cannot be required to testify, should, when offered by the opposite party, be heard concerning his own acts; and further, that confederacy having been shown, (as I think it was between these appellees,) the admissions of one confederate bind the others. For ought that appears to this Court, the declarations of Stevens, which were excluded, would have amounted to admissions of acts done by himself, or by himself and Sweat, from which fraud, undue influence, or other invalidating matter, would have appeared against the will.

WITHERS and GLOVER, JJ., concurred.

Motion granted.

State vs. Kennedy.

THE STATE EX REL. L. BELSER *vs.* JOHN D. KENNEDY AND
OTHERS.

B. was plaintiff's agent to collect her rents. She issued her distress warrant to defendant, a constable, to distrain for rent due her. After the goods were distrained, B. directed all further proceedings to be stayed. In an action against the constable for returning the goods and not selling them, *held*, that it was competent for him to show by parol B.'s agency, and that he had directed the proceedings to be stayed.

BEFORE WARDLAW, J., AT CHARLESTON, SPRING TERM,
1854.

The report of his Honor, the presiding Judge, is as follows:

"Debt on a constable's bond:—Plea, performance.

"Breach assigned in replication—that J. D. Kennedy, constable, did not safely keep goods which he had distrained for rent, under a warrant, issued in the case of Louisa Belser, lessor, and T. H. La Rousselier, tenant.

"Demurrer, on the ground that in executing a distress for rent, a constable is a mere private agent, and not an officer performing a public duty.

"Demurrer overruled: and *respond. ouster*, by consent.

"Rejoinder—that after the constable had seized the goods, the lessor, Louisa Belser, directed him to discharge the levy, and yield the possession.

"It appeared that Chas. Blum applied to magistrate Schroder for a distress warrant, to collect rent due by La Rousselier to Mrs. Belser. The magistrate called on Mrs. B. for an affidavit—she made it, and said to the magistrate that Col. Blum was her agent for collecting her rents. The warrant was issued by the magistrate (a) and delivered to J. D. Ken-

(a) The warrant was in the usual form—issued in the name of Mrs. Belser, under her hand and seal, and witnessed by the magistrate.

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nedy and another constable (Manahan) for execution : they distrained goods, took bond for their forthcoming, and on the day appointed were proceeding regularly to sell. Through the interference of Mr. Campbell, the magistrate was induced to confer with Col. Blum, who after hesitation agreed to depend upon other means of collection which had been held out, and directed the magistrate to stop further proceeding on the distress. The magistrate in haste sent verbal and written instructions to the constables saying, "The case is settled—stop all proceedings." The constables abandoned the goods—Col. Blum was disappointed—the goods removed, and the rent lost.

"It did not appear that Col. Blum was to receive compensation for his services.

"I considered the liability of the defendants to depend upon the validity of the authority under which the constables acted in stopping the proceedings; and I submitted to the jury the question of fact, Was the order of discharge authorised by Mrs. Belser?

"Verdict for defendants."

The plaintiff appealed, and now moved for a new trial on the grounds,

1. Because his Honor erred in admitting parol evidence to modify the terms of a written instrument under seal.

2. Because his Honor refused to charge the jury that the general agency of Col. Blum to collect Mrs. Belser's rents, (the only agency proved,) was determined by the appointment of a special agent under a distress warrant; and that without proof of some authority subsequently conferred on him, authorising him to control the distress, there could be, under the circumstances, no valid release of the levy, except an immediate release by the landlord.

3. Because there was no evidence of Col. Blum's authority

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to control the levy, inasmuch as there was no evidence of the nature and extent of his agency.

4. Because the verdict was, in other respects, contrary to the law and evidence.

Ramsay, for appellant.

Torre, contra.

The opinion of the Court was delivered by

WITHERS J. At the instance of Blum the distress warrant was issued, that is to say, the magistrate was set in motion for that purpose; and at his instance proceedings under it were abandoned. The question was whether his act in directing such abandonment was that of the plaintiff. The jury have so affirmed upon evidence to the effect that Mrs. Belser said upon the occasion of a conference with the magistrate, and upon the issuing of the warrant, that Blum was her agent in collecting rents.

It is objected that this was revoking, or abrogating a power of attorney under seal, to wit, the distress warrant, by parol evidence, to wit, by the mere declaration of Mrs. Belser.

Before it becomes necessary to examine the law cited for the proposition, the previous inquiry arises, Does the case present the point?

It is not the substitution of one agent in lieu of another, to do the same thing, in the same or a different manner; nor the carving out from Blum's agency a portion which is committed to another—in derogation of the rights and interests of one agent as against another, or of the rights and interests of a third party as against the principal. It was a transaction in furtherance of Blum's agency in the business of collecting the plaintiff's rents. It seems to this court to be no more than the control and direction by Blum, of an executive officer, in a

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particular calling for his service towards the end of Blum's agency. There is no more in this than the common and familiar case of an attorney dealing with the sheriff in administering an execution.

The constable in this case may be aptly likened to the sheriff in that case, for he was acting officially under process, procured at Blum's immediate instance, but in character of plaintiff's representative, and this in pursuance (it is supposed) of the declaration of Stat. 13 Ed. 1, Ch. 37 (2 Stat. 422.) "that no distress shall be taken but by bailiffs sworn and known."

Whatever may be said in the books as to the law of bailiffs of manors in England, or of the technical plea of release of an obligation secured by deed, it must be held competent for the plaintiff, by parol, to have placed this process under the direction of Blum, so that he should be fully authorised to control it. This must be true when, as in this instance, the plaintiff's interest alone is concerned, however it might be if the constable had held an agency coupled with an interest in himself, or whose proceedings had involved the interest of a third party. To this last state of things would more aptly apply the citation of law upon the questions of evidence and revocation of agency, raised and argued. Whether the plaintiff did confer upon Blum such control over the warrant of distress in the defendant's hands, was the question submitted to the jury, and found by them in the affirmative. Nor was this resolution without reason; for to what other purpose need the plaintiff have referred to Blum as her agent on the very occasion of her conference with the magistrate, touching the rent in question, and in the very act of signing the warrant for it? The argument would admit that Blum might have received the rent from La Rousselier and thus have discharged all proceedings. Then why may not the jury be competent to enquire whether he had done that which was tantamount—whether he had not given an acquittance, under his responsibility to his principal, which should discharge further proceedings by law?

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For such reasons we do not perceive the error imputed to the Circuit Court, and the motion therefore is dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

A. J. McKNIGHT vs. T. R. SESSIONS.

In an action on a bail bond, an arrest of the principal, by the sheriff, under *ca. sa.*, may be shown by parol.

The arrest of the principal under *ca. sa.* discharges the bail; and a subsequent discharge of the principal with his consent under the Act of 1815, does not revive the liability of the bail.

BEFORE GLOVER, J., AT GEORGETOWN, SPRING TERM,
1854.

The report of his Honor, the presiding Judge, is as follows :

“The action was debt on a bail bond. The defendant was the surety of J. M. Commander, against whom bail process had issued at the suit of the plaintiff; who, having obtained judgment, entered a *capias ad satisfaciendum* in the Sheriff's office, and the only question submitted by the pleadings, or made by the evidence was, has there been such a breach of the condition of the bond as fixes the liability of the bail?

“E. Waterman, Jr., Ex-Sheriff of Georgetown, stated, that a *ca. sa.* was entered in his office, in the case of A. J. McKnight vs. J. M. Commander, and under this *ca. sa.*, Commander was arrested. ‘He put his hands upon him, and regarded him in

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his custody.' Commander promised to give a bond if plaintiff would not consent to release him. He was at large, because of the understanding between witness and Commander respecting his release by the plaintiff. Witness did not tell Mr. Dozier, that he had not arrested nor released Commander, but that he had taken no bond. The plaintiff told witness, after the arrest, to let Commander alone, who produced an order from the plaintiff to discharge him, and witness did so. He made no record of the arrest at the time, because he was waiting to hear from the plaintiff, and to know if he would discharge Commander.

"Mr. Dozier stated, that E. Waterman, Jr., said to him, on the wharf, before last Court, that there had been no arrest nor release : that he had written to Commander, who replied, that if plaintiff would not agree to the proposition to release, he would surrender.

The Jury was directed to enquire, if there had been an arrest of Commander under the *ca. sa.*; and if he had been discharged from that arrest by the agency and direction of the plaintiff. These were the only questions involved and litigated, and their decision depended on the construction of the evidence, which was contradictory ; and, in the apprehension of the presiding Judge, the decision of both questions was properly for the jury, to whom he submitted it.

"Their verdict was for the defendant."

The plaintiff appealed, and now moved for a new trial on the grounds :

1. Because there was no evidence of any actual arrest sufficient to discharge the bail.

2. Because the statements of E. Waterman, the late sheriff, respecting a certain constructive arrest of the principal, were entirely too indefinite and vague to rebut the legal presumption arising from the silence of the record ; more especially as the

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said E. Waterman, by his contradictory statements, showed that his acts had reference to no fixed purpose beyond giving notice to the principal of *ca. sa.*, and allowing him time to consult the plaintiff.

3. Because the law having directed the manner in which the sheriff shall make known his official acts, it is incompetent to allow secondary evidence without proof of the loss of the primary.

4. Because the same certainty of proof should be required to establish an arrest under a *ca. sa.*, as is required to establish the fact of a surrender by the bail. Any less certainty is destructive to the rights of the plaintiff in requiring the bail, and his Honor should have so instructed the jury.

5. Because, if the principal's arrest by the sheriff was sufficiently proven, his subsequent release by the plaintiff with his own consent, restored to the plaintiff all his rights and remedies against the bail.

Mitchell, for appellant.

Simonton, contra.

The opinion of the Court was delivered by

GLOVER, J. In civil process the return of the sheriff on the writ is evidence of the arrest; but like any other fact, it may be shown by proof *aliunde*. In the case of *Moyers vs. Center*, (2 Strob. 439,) the Court ordered that the surrender of bail hereafter, should be acknowledged by the sheriff on the bail bond, or by a separate instrument of writing; and it has been insisted in argument, that the same certainty of proof should be required to establish an arrest under a *capias ad satisfaciendum*. Objections may be suggested to such an application

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of the order, but it is only necessary to say, that the Court has confined it to the surrender of bail, and that it does not, nor was it intended to apply it to an arrest.

Admitting that the arrest was proven, the appellant submits that the subsequent discharge of the principal by the plaintiff, with his own consent, restored to the plaintiff all his rights and remedies against the bail. The arrest of a debtor is legally a satisfaction of the debt, and the liability of his bail then ceases, unless the provisions of the Act of 1815 (6 Stat. 1,) have modified the law in that respect. Under the Act, the debtor is expressly discharged from the arrest, whilst the *lien* of the judgment on his estate is preserved. A special liability is created, having reference to the estate, and not to the person of the debtor. The active energy of the *ca. sa.* ceases with his discharge, and if he is liable to arrest afterwards, the plaintiff must take out another *ca. sa.* against his body, as the Act directs. If the rights and remedies of the plaintiff against the bail be restored after a discharge under the Act of 1815, so too would the bail be restored to his co-relative rights and remedies; yet it cannot be maintained that the principal, in such a case, continues in the custody of his bail, and may be surrendered by him.

We are of opinion that the arrest was established by sufficient evidence; that it discharged the bail, and that the subsequent release of the principal from imprisonment revived no liability on the part of the bail.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

MUNRO, J., was of counsel, and gave no opinion.

Motion dismissed.

State vs. Town Council.

THE STATE EX REL. H. P. WALKER vs. TOWN COUNCIL AND
TAX COLLECTOR OF MOUNT PLEASANT.

The town council of Mount Pleasant have power, under their charter of 1845, to make assessments and levy taxes on the inhabitants, &c., and enforce payment "to the same extent, and in the same manner, as is provided by law for the collection and payment of the general State tax:"—*Held*, that the authority of the town council was subject to the provision of the Act of 1788, that one believing his property overrated in the assessment, may swear off the excess.^(a)

BEFORE MUNRO, J., AT CHAMBERS, SEPTEMBER, 1854.

The report of his Honor, the presiding Judge, is as follows:

"This is a motion for a prohibition to restrain the respondents from collecting a tax, which has been assessed by them upon the relator's real estate, situate within the corporate limits of the Town of Mount Pleasant.

"The following are the leading facts of the case, as set forth in the suggestion:

"That the relator is the owner of two lots of land situate in said town, which lots were assessed by the respondents in the year 1853, for the purposes of taxation, at three thousand five hundred dollars, but that the same property has been assessed by them the present year, for similar purposes, as of the value

(a) It is a matter of some doubt whether the clause of the Act of 1788, upon which this decision was made, has not been repealed. It is omitted altogether by Brevard. (See 2 Dig. Title, 162.) In 5 Stat. at Large, 50, it is printed as section 6, and an Act passed in 1799, (5 Stat. 366,) repeals the 6th section of the Act of 1788. On the other hand, in P. L. the Act of 1788, as there published, contains but eight sections—the 6th section in that publication corresponding with the 25th in Stat. at Large. A reference to the original Act itself can alone remove the doubt.

R.

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of five thousand five hundred dollars, upon which, a tax has been assessed by them, of five-eighths per cent. That the relator, believing his said property to have been overrated by two thousand dollars by the assessors, claimed the right to swear off that amount, and tendered to the tax collector an oath to that effect, who refused to administer the same, or to make any abatement from said assessment.

“All which, the relator alleges, is contrary to the provisions of the Act of the General Assembly, declaring the duties of the inquirers, assessors and collectors of the taxes, passed on the 26th of February, 1788; to the provisions of which, the powers of the Town Council of Mount Pleasant are subjected, by the 23d section of the Act of the General Assembly, passed on the 15th December, 1845.

“In the answer of Mr. George F. Kinloch, the Intendant of the Town, he admits that the assessors appointed by the Town Council had assessed the relator's real estate as of the value stated in the suggestion—that said assessment had been adopted by the Council, who had assessed a tax of five-eighths per cent. thereon—but as the relator had insisted upon his right to swear off so much as he believed his property to have been overvalued by the assessors, and had refused to pay the tax that had been assessed thereon, the respondent had directed an execution to be issued against him.

“It appears that the Town of Mount Pleasant was first incorporated in the year 1837, but without the power of taxation. By the 23d section of an Act passed in the year 1845, an Act amending its charter, the power in question was conferred upon it in as full and ample a manner as will be found in the charter of any incorporated town in the State. It is as follows :

“That the said Town Council shall be vested with full power and authority to make such assessment, or to levy such taxes on the inhabitants of Mount Pleasant, or those who hold taxable property within the same, for the safety, convenience,

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benefit, and advantage of the same, as shall appear to them expedient, &c. And the said Town Council shall hereafter be authorized to enforce the payment of taxes and assessments levied on the property and persons of defaulters, to the same extent, and in the same manner, as is provided by law for the collection and payment of the General State Tax.

“The position assumed by the relator, in the suggestion, and which, by the way, was more fully developed in the argument, is, that by the express terms of the 23d section of the Act of 1845, the powers of the Town Council are subjected to, and controlled by, the provisions of the 6th section of the Act of 1788, by which section, a party who believes his property to have been over assessed, is permitted to swear off before the collector, the amount he believes it to have been overrated. But a reference to the language of the section in question, will at once show, that the construction attempted to be put upon it is wholly untenable ; for, with becoming deference to the intelligent counsel who prepared these proceedings, and argued the motion, I think I hazard nothing in saying, that there cannot be found in the whole of the section, a single word or phrase, which, by any legitimate rule of interpretation, is susceptible of such a construction—or that has even the most remote reference, either to the Act of 1788, or to the subject matter of any of its provisions. It is true that the concluding part of the section does contain a reference to another legislative enactment ; but such reference, it will be seen, is not to the Act of 1788. On the contrary, it refers in the most explicit terms, to an entirely different statute—the statute prescribing the mode and manner of collecting the public revenue. But if the language of this section be at all susceptible of the construction contended for, the reference to the Act of 1788 must be general—that is, it must be to the whole of the Act, and not to any particular section of it. By referring to the Act, it will be seen that it contains in all — sections. Where, then, it may be asked, is the authority for restricting such reference to the

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6th section and its provisions, to the entire exclusion of all the others?

“But if we take into view the entire scope and design of the Legislature in passing the Act of 1845, it is manifest that it could never have been the intention of that body to subject the Town Council to any one of the provisions contained in the Act of 1788, and more especially to those contained in its sixth section.

“Having withheld from this corporation, in its original charter, the power of taxation, it was clearly the intention of the Legislature to confer upon it, for corporate purposes, this important power, in all its amplitude.

“This it has done by the 21st section of the Act, in which it is declared, in language clear and unambiguous, ‘that the said Town Council shall be vested with full power and authority to make such assessments, or to levy such taxes on the inhabitants of Mount Pleasant,’ &c.

“From this comprehensive and explicit delegation of power, the authority of the Council to create, and put in motion, all the corporate machinery necessary and proper to carry it into effect, ‘for the safety, convenience, benefit, and advantage of the said Town, as shall appear to them expedient,’ is derived by necessary and legitimate implication.

“Among the first things that appear to have occupied the attention of the Council after obtaining this newly acquired power, with the view of carrying it into effect, and of imparting to it efficiency, was the passage of an ordinance on the 26th February, 1846, entitled ‘An Ordinance for the appointment of Town Assessors, and defining their duty.’

“Here, then, we find the Town Council of Mount Pleasant, on the 26th February, 1846, and by virtue of the authority vested in it by the amendment to its charter, employed in the identical task that had occupied the attention of the Legislature on the 27th day of February, 1788, namely, the enactment of

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a law, which, in its title, in its objects—nay, in all its essential provisions, with but one exception, is identically the same.

“If, then, it be conceded that the Town Council really possessed the power to pass such an ordinance, for the appointment of appraisers, &c., what was there, it may be asked, to have prevented it from adding another clause to it, containing the very same, or similar provisions to those contained in the 6th section of the Act of 1788, for it is obvious that all these several provisions—that is, those contained in the Ordinance of the Town Council, as also those contained in the 6th section of the Act of 1788, trace their origin to the same source, and are but kindred incidents of the same original power—the power to make assessments, &c.

“Why the Town Council has hitherto abstained from adopting such a provision, it is not for me to say. This is a matter that rests exclusively between that body and its constituency. This much, I, however, will venture to say, that however long the adoption of such a provision into its municipal code, may remain with that body a question of expediency, I feel assured it can never be made a question of power.

“I would merely add in conclusion, that until the foregoing position I have attempted to sustain can be successfully controverted, we cannot attribute to the Legislature, without speaking of that body in language that would be indecorous, an intention to engraft upon the amended charter of this Corporation—the Act of 1845—the conflicting provisions contained in the 6th section of the Act of 1788.

“Entertaining these views of the case, I cannot do otherwise than refuse the motion.”

The relator appealed on the grounds :

1. That his Honor's construction of the Act of 1845 is erroneous.

2. And that an admitted over assessment of two thousand

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dollars is a wrong for which the law must afford some remedy, and that the relief sought by the relator is the most complete and proper.

H. P. Walker, for appellant.

Bailey, contra,

The opinion of the Court was delivered by

WARDLAW, J. The 23d section of the Act of 1845, (11 Stat. 320,) gives to the Town Council of Mount Pleasant full authority in making assessments and levying taxes. Under this authority, the Town Council may ordain, in respect to the persons liable to the jurisdiction, as effectually as the Legislature may enact in respect to all the citizens of the State, what rate in proportion to value shall be imposed upon land or other property, what articles shall be specifically taxed, and how much the taxes upon specified articles shall be. The section further provides, that the Town Council may enforce the payment of taxes and assessments ordained by it, to the same extent and in the same manner as is provided by law for the collection and payment of the General State Tax.

A reference to the Act of 1788, (5 Stat. 50,) and to the other Acts of the Legislature concerning the collection of taxes, will show the general scheme for the collection of State taxes to be this: to wit.: persons liable to taxes are required to make returns on oath; the assessor, (who, in general, is the same as the tax collector, but in St. Philip's and St. Michael's is a different person,) fixes the value of property assessed where an assessment or *ad valorem* tax is imposed, and the amount of each person's liability is ascertained; on or before a prescribed day payment is to be made to the tax collector by each person liable to pay; at the time when he is required to pay, any person who may have reason to believe that he has been over-

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rated, is allowed to swear off the excess; if payment of the whole, or of the balance after excess sworn off, should not be made, process of execution is issued and enforced by the sheriff: if no return should have been made, the execution is for double the amount, which the collector may judge the defaulter ought to be rated at.

Proceeding in conformity with the State Law, the Town Council, for the collection of its taxes and assessments, has appointed assessors to assess according to a scale that will bear equally on all; it has appointed a treasurer to receive returns and payments; it has required returns to be made to the treasurer, and payments to be made to him, by a prescribed day, and it has directed executions against defaulters, which shall be for double taxes when returns have been neglected. But it has refused to allow the relator, who says he has been over-rated, to swear off the excess, although he offered to do so on or before the day appointed for payment.

If five-eighths of one per cent. upon the value of the relator's house and lot was to be collected under an Act, laying a general State Tax, no tax collector could, by any process, collect an excess over the rate according to that value which the relator would, in proper time, swear to; and no power is given to the Town Council to enforce its ordinance for an assessment to a greater extent than a State Act to raise supplies could be enforced.

It has been argued for the Town Council, that the latter clause of the section above mentioned, refers merely to the collection of taxes not paid without process of execution, and was intended to confer power, not to restrain it; to authorize the employment of well known process, and of State Officers, not to impair the right of the Town Council to make such ordinances as might appear to it expedient, concerning its taxes and assessments. But the extent to which process may be enforced, is of course the measure of the extent to which payment without process will be made; and the effect of an

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enactment which establishes identity of extent and manner between the enforcement of town taxes and the enforcement of State taxes, is, whilst it gives authority conformable to the provisions of the State Law, to deny authority beyond and contrary to those provisions. Could a Town Ordinance subject a defaulter for neglect to make his return to more than double taxes? The Town Council seems to understand that it could not. And as the State Law imposes a restraint upon the discretion of the State assessor, so a like restraint must be imposed upon that of the Town assessors. The policy of exacting oaths on such subjects has been much questioned, but the Legislature has required them and given them effect here, and the council cannot deny their sufficiency.

The motion is granted and the prohibition is ordered according to the prayer of the relator's suggestion.

O'NEALL, WHITNER and GLOVER, JJ., concurred.

MUNRO, J., dissented.

Motion granted.

Huger vs. Dibble.

DANIEL E. HUGER, JR., vs. MRS. DIBBLE.

One occupying and paying rent under an agreement in writing for the renewal of a lease for three or more years, is a tenant from year to year, and not a tenant according to the terms of the agreement to renew.

IN THE CITY COURT OF CHARLESTON, MAY TERM, 1854,

The report of his Honor, the Recorder, is as follows :

This was an action for use and occupation, to recover the balance of *two* quarters' rent alleged to be due by defendant to plaintiff under the following circumstances :

" Plaintiff had executed a *written* lease of the *locus in quo* to defendant, for *one* year, from the 1st of October, 1850, to the 1st of October, 1851, at nine hundred dollars per annum, payable quarterly, with privilege to the defendant of renewing the lease, on the same terms, for *three* or more years. The lease, among other covenants, contained one that defendant should give plaintiff *three* months' previous notice of her intention to vacate the premises. Without any thing else, said or done, defendant continued to occupy the premises, after the expiration of the *first* year, and to pay rent on the terms of the original lease, and plaintiff to receive the same, until June,

1853, when plaintiff gave written notice to defendant that, after the termination of the *then current* year, she must pay rent at the rate of twelve hundred dollars per annum, payable quarterly. Thereupon defendant gave notice that she claimed or elected to occupy the premises, for at least *three* additional years, according to the terms of the original lease, and refused to pay or to recognize any liability to pay the increased rent demanded. The action was brought for one hundred and fifty dollars, the balance of two quarter's rent (*i. e.* seventy-

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five dollars each) due for the quarters ending on the 1st of January and the 1st of April, 1854, at the rent of twelve hundred dollars per annum, or three hundred dollars per quarter, with interest on the balance of each quarter as it became due, the rent originally reserved having been paid and received by consent of parties without prejudice.

"The question involved appeared to me to be a question of law, upon an admitted state of facts, and I thought was so considered and treated by the counsel on both sides. In this submission of the case, under my instructions to the jury, I charged them substantially (I believe) as represented in the defendant's grounds of appeal.—That it appeared to my mind there were no circumstances proved in the case, upon which the jury would be authorized to imply a renewal of the *original lease* for another term of three years; that the defendant was to be regarded, after the expiration of the original term, or *one* year, as holding over simply from year to year, on the terms of the original lease, as to the *amount* and *time* of payment of the stipulated rent, and not for a renewed term of *three* years. That the plaintiff therefore had a right to terminate the tenancy at the expiration of the *third year*, under the notice given as above stated, and as a matter of law was entitled to recover the balance of the increased rent, with interest; and the jury rendered a verdict for the plaintiff accordingly."

The defendant appealed on the ground:

1. That his Honor erred in charging that there was no renewal, express or implied, on the original lease for a prolonged term.

2. That his Honor erred in charging that the plaintiff, as a matter of law, was entitled to recover increased rent; whereas he should have left it to the jury to decide as a question of fact, or a mixed question of law and fact, whether the original lease was renewed or not.

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8. That the verdict was in the foregoing, and other respects, contrary to law and evidence.

Yeadon, for appellant.

Mitchell, contra.

The opinion of the Court was delivered by

WARDLAW, J. A covenant for the renewal of a lease is like an executory agreement for an original lease. It is not a present demise, conferring an *interesse termini*, but is a stipulation for a demise to be made, giving a right to compel specific performance. If premises be occupied under it, and rent be paid, a tenancy from year to year will be implied, but our Act of 1817 (7 Stat. 67 § 3) as well as the English Common Law, forbids that under such parol contract as is implied in cases of tenancy from year to year, the tenant should have a right of possession for a longer term than twelve months.

It was the duty of the defendant to have signified her option concerning the renewal at or before the expiration of the original lease. It has been argued that her giving no notice of an intention to quit, and her payment of rent for the second year, amount to the expression of her option and thus raise the implication of a renewed lease for three years, commencing October 1st, 1851. These are the very circumstances which plainly raise the familiar implications of a tenancy from year to year: even if they could be considered to express the option of the defendant, and a lease for three years could be made without writing, they could not supply that positive demise by the plaintiff, which the option would have given a right to, but would not have created. The circumstances are however strongly viewed in favor of the defendant, when they are said to be even equivalent to the expression of the defendant's option. If three months before the end of the second year, rents had fallen, and

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the defendant had given notice of her intention to quit, it would not have been possible for the plaintiff to recover from her the rent of the next two years upon the allegation that the lease had been renewed, when it would have appeared that the lease never had been in fact renewed, and the evidence of defendant's assent to the renewal would have been only such evidence as shewed her to be a tenant from year to year.

This Court is of opinion that the Recorder's view of the law was correct, and that the jury would not have been authorized in finding the verdict which the defendant desired.

The motion is dismissed.

O'NEALL, WITHERS, WHITNES, GLOVER, and MUNRO, JJ., concurred.

. *Motion dismissed.*

McBride vs. Ellis.

B. McBRIDE vs. D. H. ELLIS.

B. McBRIDE AND WIFE vs. THE SAME.

It is the duty of the clerk to enter causes on the issue-docket in the order in which the issues are made up—the first issue made up should be the first entered. Where the issues are made up at the same time, the directions of the plaintiff's attorney, as to the order in which the cases should be docketed, should be regarded by the clerk; and in default of all directions the discretion of the clerk must, in such cases, determine the order.

BEFORE WARDLAW, J., AT BEAUFORT, FALL TERM, 1854.

The report of his Honor, the presiding Judge, is as follows :

“Under a rule on the Clerk sued out by the defendant's attorney, the question was presented, which of these cases should be first docketed on the issue docket.

“By the return to the rule and statements made at the bar, it appeared that the declarations were filed, and rules to plead posted in both cases at the same time; that when he filed the declarations, the plaintiff's attorney requested the Clerk to docket the last named case first, and the Clerk made on the papers a memorandum to that effect; that the Clerk in conformity with what had been the usage of his office, promised to comply with this request: that the defendant's attorney pleaded the general issue in the first named case, but at that time declined to plead in the other, saying to the Clerk that he desired the first named to be first docketed; that the plaintiff's attorney added the *similiter* in the first named, and proper entries of the pleadings were made by the Clerk in his RULES BOOK; but when the purpose of the defendant's attorney was understood, the plaintiff's attorney, (under what he conceived to be his right) withdrew the record from the Clerk and forbade him to docket the case; that afterwards the issue was

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made up in the last named case, before the rule to plead expired; and that the Clerk had docketed neither case.

"I held that the plaintiff's attorney had no right to the possession of a declaration after it was filed, until there was either an order for interlocutory judgment or an issue joined; and that he could not by withdrawing the record prevent the docketing of a case prepared for the docket; that it was the duty of the Clerk to docket cases in the order of the times at which they were made ready for docketing, and that the request of the plaintiff's attorney and promise of the Clerk, could not affect the rights of the defendant.

"So I directed that the two cases should be docketed in the order in which they are named above."

The plaintiff appealed on the grounds:

1. Because his Honor erred in controlling the discretion of the Clerk as to the order of entering the issues on the docket.

2. Because whatever instructions his Honor may have rightfully given for the guidance of the Clerk in regard to future cases, his Honor erred in overruling the promise of the Clerk to the plaintiff's attorney, made in accordance with the usage of his office, in the hitherto unsettled state of the practice.

3. Because his Honor erred in denying the right of the plaintiff's attorney to withhold his cause from the docket after issue joined, until the sitting of the Court.

4. Because the ruling of his Honor operated a surprise on the plaintiff, and is in other respects contrary to law.

Fickling, for appellant.

Martin, contra.

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The opinion of the Court was delivered by

WARDLAW, J. The plaintiff's attorney, when he filed the declarations in these two cases, no doubt expected they would proceed *pari passu*, and under that expectation gave to the clerk his directions about docketing. If the issues in the two cases had been joined at the same time, the directions of the plaintiff's attorney ought to have been regarded by the clerk, and in default of all directions, the discretion of the clerk would have determined the order of cotemporaneous issues on the docket. When the defendant's attorney departing from the course which was expected, pleaded in the first named case, and declined to plead then in the other, the plaintiff's attorney might probably have still attained his wish concerning the order of the cases on the docket by delaying the entry of the *similiter* in the first named case. But the *similiter* having been entered, the issue in the first named case was made up, the plaintiff's attorney was then (and not before) entitled to the possession of the paper record, (66th Rule of Court) and the parties were bound to come to trial at the next term, without notice of trial. (24th Rule.) The clerk was consequently bound to docket the case, (Rules 17, 20), and even without possession of the record might well have done so from his Book of Rules. (11 Stat. 71, § 8 and 3.) The subsequent joinder of issue in the other case in no way affected the rights of parties in the first named case, and the questions of precedence between these two cases is the same as it would be between two other cases in which all the parties are different. The clerk is bound to prepare the docket before the meeting of the Court on the first day of the term. (17th Rule.) No earlier time is prescribed to him, but it does not follow that he can regulate the order of cases at his pleasure. The trial of causes must be in the order of the docket (Rule 18th); that order then is of material importance, and in the absence of other rules, equality amongst suitors and encouragement of diligence suggest the order of

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time as the most natural, just and expedient rule for settling the order of precedence on the docket.

The English practice of withdrawing a record is inapplicable to our rules and has reference to a time subsequent to the entry or docketing of the cause. (Arch. Pr. 168.)

This Court is then of opinion that there was no error in the ruling of the Circuit Judge, and the motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Gourdin vs. Read.

W. A. GOURDIN vs. J. H. READ, JUN.

Though a surety may by parol authorize his principal to fill up blanks in the bond, with the date and the name of the obligee, yet before the blanks are filled up and the bond delivered he may revoke the authority, and it makes no difference whether the obligee, in whose name the blank is afterwards filled up, knew when he took the bond that the authority was revoked or not.

BEFORE GLOVER, J., AT GEORGETOWN, SPRING TERM,
1854.

The report of his Honor, the presiding Judge, is as follows :

“The action was debt on a penal money bond against the defendant and John M. Commander. Commander having confessed judgment, the action proceeded against John Harleston Read, Jun., and a verdict was rendered for the defendant at Fall Term, 1851.

“This was a new trial, ordered on plaintiff’s motion, and the evidence (which is in writing, and may be added to this report) does not vary the case made on the first trial. See *Gourdin vs. Commander and Read*, 6 Rich. 497.

“In considering the several grounds of appeal, the Court substantially decided the various questions that arose on the second trial, and the presiding Judge did no more than read, and direct the attention of the jury to, the principles settled by the Court, and applicable to the case, without intending to withdraw from the jury the decision of questions legitimately within their discretion.

“The defendant’s counsel requested that the jury should be instructed, that if the authority of Read to Commander to fill up and negotiate the bond had ceased, the continued custody of the bond did not, and was not sufficient to confer such authority; and that the question, whether such authority had ceased is a question of fact for the jury.

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“The jury was instructed, that if they were satisfied, from the evidence, that the authority had ceased, and that fact had been brought home or communicated to the plaintiff, he would be affected by such notice.

“A verdict was given for the plaintiff.”

The defendant appealed, and now moved for a new trial, on the grounds :

1. Because his Honor erred in not charging the jury, that the validity of the bond depended upon the fact of Commander's having conformed to the authority and instructions given him by the defendant, John Harleston Read : and that if he had departed from these in any important particular, the bond, when completed, would be invalid.

2. Because his Honor erred in not charging the jury, that if the defendant, John Harleston Read, had withdrawn any authority at first given to Commander to negotiate the bond : or if such authority did not continue to exist at the time that the bond was filled up and delivered to the plaintiff, that it could not bind the said defendant as his deed.

3. Because his Honor erred in not charging the jury, that it was a question of fact to be determined by them, whether any authority given to Commander to negotiate the bond had not ceased or been determined, expressly or impliedly.

4. Because his Honor erred in charging the jury, that they had no discretion in the verdict which they were to give, but were bound, under the opinion of the Court of Appeals, to find a verdict for the plaintiff.

Mitchell for appellant.

Petigru, Simonton, contra.

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The opinion of the Court was delivered by

WITHERS, J. It has been heretofore adjudged in this cause that Commander might be duly authorized by parol, as the agent of the defendant, to fill up a penal bond, signed by him as surety of Commander, with the date and the name of the obligee—being blank in those particulars when it was signed—and to deliver the same. Upon the last trial below the defence urged, that before these acts by Commander, his authority, as above defined, had been revoked; and the Circuit Court held that this being proved, it would operate a good defence, provided the fact of such revocation had been brought home or communicated to the plaintiff. The question presented is whether it was proper to qualify the question of authority revoked with the qualification of notice to the plaintiff.

We think such charge to the jury was erroneous. The paper in question is not one of the instruments which enter into the currency of commerce. The right of Commander to make it complete and negotiate it by delivery to a third person, as a binding obligation upon Read, depends upon the authority derived from Read for that end, express or implied. Gourdin's title rests upon the fact of the existing power of Commander at the time he inserted his name as obligee and delivered it, to do that as the act of Read—and the principle would be the same as if the amount in penalty or condition had been left blank, and filled up. The plaintiff judged of the creation and continued existence of Commander's authority from the circumstances before him. He also took the risk of its revocation from a view of the same circumstances. Whether he had notice of its revocation does not affect the question; yet for any thing we can know this may have been the pivot upon which the case turned with the jury. As matter of right, therefore, the case must be tried again, that the jury may enquire whether Commander was authorized by Read, expressly or by proper implication, to treat the bond, the subject of this action, as he

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has done—and if so, whether he revoked that authority, before the transaction on the part of Commander and the plaintiff.

New trial ordered.

WARDLAW and WHITNER, JJ., concurred.

GLOVER, J. I dissent.

MONRO, J., having been of Counsel gave no opinion.

Motion granted.

Papot vs. Trowell.

SAMUEL M. PAPOT vs. THOMAS TROWELL.

An infant beyond seas is entitled to but four years *after coming of age* within which to commence an action of trover.

BEFORE WARDLAW, J., AT CHARLESTON, SPRING
TERM, 1854.

THE report of his Honor, the presiding Judge, is as follows :

“ Trover for certain slaves.

“ The defendant, besides the general issue, pleaded *actio non accrevit infra quatuor annos*.

“ The plaintiff replied *precludi non*, because he saith ‘ that the said slaves in the said declaration mentioned being the property of the said plaintiff, were converted by the said defendant, on the day of , in the year of our Lord one thousand eight hundred and twenty-eight, at which time the said plaintiff was an infant under the age of twenty-one years, that he arrived at the age of twenty-one years in the month of May, A. D. 1847 ; and that during all the time he was so under age, and at the time he arrived at the age of twenty-one years, he, the said plaintiff, was in parts beyond the seas, *to wit* : in Savannah, in the State of Georgia, where he now resides and has always resided, and hath never, to this time, been domiciled in the State of South Carolina, or elsewhere than in the State of Georgia. And that the said plaintiff commenced his suit within five years after the coming of age of the said plaintiff, *to wit* : on the 16th day of June, A. D. 1851, and this the said defendant is ready to verify, wherefore he prays judgment,’ &c.

“ To this replication the defendant filed a general demurrer ; and after argument, I sustained the demurrer, holding that the plaintiff was barred by the statute of limitations.”

Charleston, January, 1855.

The plaintiff appealed on the ground,

That he was entitled to five years within which to commence suit, after attaining the age of twenty-one years.

Martin, for appellant.

Northrop, contra.

The opinion of the Court was delivered by

WARDLAW, J. The replication shows that this action was neither brought within five years from the time the cause of action accrued, nor within four years from the time the plaintiff came of age. The Act of 1712, (2 Stat. 586,) in its sixth section, provides general regulations for the limitation of personal actions, which are applicable to all persons, and then, in the tenth section, enlarges the time of limitation, by special exceptions, in behalf of persons in peculiar conditions. According to this scheme, every action of trover is unbarred for four years from the time the cause of action accrued. Where the plaintiff is beyond seas, *feme covert*, or imprisoned, five years from the cause of action accrued are given; and an infant, who in no case is barred in less time than would bar an adult, is allowed, notwithstanding more than four years from the cause of action accrued would thus be given, to bring action within two years from coming of age, or if beyond seas, within three years. By the Act of 1788, (5 Stat. 77,) the time from his coming of age for an infant to bring a personal action is extended to four years, without distinction between the cases of his being within the State and being out of it. It follows that an infant beyond seas may avail himself of either of the provisions made for the two disabilities to which he is subject. He may have five years from the accrual of his cause of action, or four years from his coming of age, which ever may be most advantageous to him; but there is no exception to the general

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Act of limitations, which, after the expiration of five years from the cause of action accrued, adds to the four years given by the Act of 1788, another year, because the plaintiff, who was an infant when his cause of action accrued, was then and always afterwards out of the State.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January, 1855.

JACOB COHEN *vs.* HENRY WIGFALL.

Defendant lived over four months in the summer with his father-in-law in the city of Charleston. In the winter following he removed to his plantation, and while there he was sued in the City Court—the writ being served by copy left at the house of his father-in-law. In the May after he returned to the city and again spent the summer with his father-in-law:—*Held*, that defendant was a resident within the meaning of the Act of 1818, and subject to the jurisdiction of the City Court.

BEFORE HIS HONOR THE RECORDER, IN THE CITY COURT.

This case was heard upon a statement as follows :

“The defendant had lived at the house of his father-in-law, in Charleston, during the summer of 1851, for over four months. In the winter of 1851 and 1852, he had removed, and lived upon his own plantation where he still was when the copy writ was left at the house of his father-in-law, in Charleston, on the 23d April, 1852. Sometime after the 1st of May, 1852, he returned to the house of his father-in-law, and spent the summer there.”

The report of his Honor, the Recorder, is as follows :

“The ground of appeal in this case calls in question the jurisdiction of the Court. To give jurisdiction, firstly, it is clear, the defendant in any case, must be shown to *have been a resident* at the time of *the service of the process*. Secondly, either to have been a resident for *three months immediately* preceding the commencement of the action or prosecution, or to have been in the habit of residing previously, in the city, for *four months in the year*. The evidence as to residence in this case, consisted in a statement, agreed upon or conceded by the plaintiff’s counsel to be correct, which will be found annexed. I regarded the question of residence, as a matter of *fact*, to be

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submitted to, and decided by, the *jury*. In my instructions to them, I stated the requisitions of the law, as above laid down, and that they were to decide upon the facts, as stated in the writing, whether the defendant was a *resident or not*. They were instructed, they could not find a verdict for the plaintiff unless they were satisfied by the evidence, that the party was a *resident* in either one or the other points of view, in which the law is intended to make a party sued in this court liable to its jurisdiction. Under these instructions the jury found a verdict for the plaintiff."

The defendant appealed on the ground, that on the case made, the Court had no jurisdiction over the defendant.

Torre, for appellant.

Pressley, contra.

The opinion of the Court was delivered by

GLOVER, J. The Act of 1818, (7 Stat. 319,) by its terms, does not extend to any inhabitant of this state who may not be resident within the City of Charleston. In the case of *Gildersleeve vs. Alexander*, (2 Speer, 298,) the defendant had abandoned his residence before the service of process, and it was held, that the City Court had no jurisdiction, because the party sued was confessedly not a resident.

The Act further provides, that no person shall be construed to be a resident of the city, unless he shall have resided in the said city three months prior to the commencement of the suit, or prosecution, or shall have resided in the said city four months during the year preceding the commencement of the said suit or prosecution. The defendant in the principal case, did live in the city four months during the year preceding the commencement of this suit, and there is no evidence show-

Charleston, January, 1866.

ing that he had abandoned that residence which made him subject, under the Act, to the jurisdiction of the City Court. He returned and spent the summer succeeding the service of process in this case, where he had lived the previous year, which proves the *animus revertendi* and brings him within the case of *Bartlett vs. Brisbane*, (2 Rich. 489.)

It is not necessary to add anything to the Recorder's judgment in that case, sustaining the jurisdiction of the City Court, which, on appeal, was affirmed by this Court.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and MUNRO, JJ. concurred.

Motion dismissed.

Maybin and Van Wirt vs. Railroad Company.

MAYBIN AND VAN WIRT vs. THE SOUTH CAROLINA RAILROAD
COMPANY.

For the plaintiffs, doing business in Columbia, goods were shipped from New York to Charleston to the care of the So. Ca. Railroad Company, whose course of business it was to receive and forward goods so addressed:—*Held*, that the company were not liable as common carriers until the goods were received by them for carriage.

That considering them as forwarding-agents, the rule as to their liability was not the same as that which applied to them as common carriers.

Considering them as forwarding agents they would be liable for refusing to receive, unless they showed good excuse for not receiving; and, after receiving, they would be liable for not taking all the care which a prudent man would about his own business.

IN THE CITY COURT OF CHARLESTON, JULY TERM, 1854.

The report of his Honor, the Recorder, is as follows :

“This was an action brought by plaintiffs, merchants, (residing, I believe, in Columbia,) against the defendants, for damage to goods entrusted to their *care*, or rather, perhaps, for their not having *carried* and delivered them, according to contract. The case was made up *partly* by admissions or concessions of the respective Counsel, and in the rest by some documentary evidence, and the testimony of witnesses on the trial. In my notes of the evidence will be found *references* to certain letters passing between the parties or their agents, in regard to the precise contents of which, (having been furnished with no copies,) I invite the appellants, if they deem it necessary to their case, to append copies to my report.

“The case presented some very interesting questions; and except in the grounds of complaint on the part of the defendants is to be regarded, (I presume,) as having been fairly submitted to the jury, upon the facts, and that the law was pro-

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perly expounded by the Court. It will be seen that the case submitted was not one of the more usual character, that of an ordinary shipment (so to speak,) of goods, at Charleston, by the Railroad, to be delivered to the owner or consignee, at a specified point, as for instance, at *Columbia*. In such cases, the contract is *usually* evidenced by the *written acknowledgment of the receipt* of the goods furnished by the Railroad to the consignor or owner, and containing a statement of the gist of the contract, to wit: to convey and deliver to the consignee the goods consigned. The goods, in this case, came from New York by *ship*, directed to the plaintiffs, Maybin & Van Wirt, *Columbia, to the care of the South Carolina Railroad Company, (the defendants.)* Hence, the liability of the defendants depended upon their obligation, *express* or *implied*, to take charge of these goods, and to forward and deliver them safely to the owner or consignee, at the place of delivery. The goods were never *carried* or delivered at *Columbia* by the defendants, or any one, and the main question was, what was the obligation assumed, or contract made, or to be implied as made, between the Railroad Company and the plaintiffs, for the *reception, safe carriage* and delivery of the goods in question? What character did the defendants occupy, in regard to goods arriving, (say) by *ship* at the port of Charleston, *directed to their care*, to some point of delivery on their road, (say *Columbia*?) This business of receiving freight at Charleston from foreign ports, directed to the interior, of course could not have been *intruded* upon the Company, or any obligation imposed upon them in regard to their carriage against their will. It would have been a matter entirely for the owner or consignee, or their agent at Charleston, to have shipped by the Railroad or not, as he may have thought proper, and by contracting *pro re nata* with the Railroad Company, to make them answerable by a new contract, for the safe delivery of the goods at the point designated.

“Had the defendant engaged in this business of *receiving at the Port of Charleston*, and forwarding to their respective

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designations, goods shipped from abroad for *the interior* of the country, on the line of their road? This allegation on the part of the plaintiffs depended upon the proofs submitted to the jury. Had they engaged in such business? This point was left as a matter of *fact* for the jury to determine. Upon an inspection of the testimony, it will be seen how far there was any proof to warrant such a conclusion. Without interfering (as I believe,) in the least degree, with the province of the jury, it seemed clear to me upon the evidence adduced, that the defendants had invited and undertaken to execute this sort of business, *to wit*: that of *receiving* and forwarding, by Railroad, to the interior, such consignment as might be addressed to their *care*. The jury, in finding a verdict for the plaintiffs, must have been satisfied with the proofs, that the defendants were *in the habit* and *accustomed* to this sort of business, although there was no express proof on the trial of their having *advertised* to this effect. The defendants appear to have had *an agent* for the express purpose of *receiving* and forwarding freight, thus coming to Charleston by ship from abroad, and consigned to their care. The point of the liability of the defendants in this case, was not that of *loss* incurred by negligent carriage, so much as for *non carriage*, and for not taking possession and *care* of the goods on their arrival at Charleston. It appeared to me that the Company had, in undertaking this business, assumed, of course, all the obligations and duties of any other consignee at the port of delivery, and that the public had, under this habit, or custom of the Company, a right to look to them for the discharge of the duties devolving upon a consignee. That although, as it would appear, by some subsequent regulation, made by the Company after this general assumption by them of the duties of the consignee, they should have (among themselves) determined to have nothing to do with shipments, in regard to which a *claim of average* on the score of injuries in the voyage to Charleston may have been made, this would not affect or impair the rights of any one dealing with them, on

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the faith of a well known habit or usage of trade on the part of the defendants, and in regard to which habit or custom, the plaintiffs, as far as it would appear, may never have known or heard of any subsequent limitation or qualification. The jury found a verdict for the plaintiffs, and I have received the annexed notice of appeal. The notes of the evidence taken on the trial are enclosed, and at the service of the appellants. I am not aware (until better instructed) that it devolves upon the Circuit Judge to copy voluminous notes of evidence, or furnish copies of letters or other documents adduced on the trial; copies of which have not, at any time, been furnished to the Judge below."

(Signed)

"WM. RICE."

"N. B. Since the rendition of this report, my attention has been called more specifically by defendant's counsel, to the *third* ground of his appeal. In saying to the jury that it appeared to me that whether the defendants should be regarded in the light of common carriers, or merely or simply as forwarding agents, the gist of the liability would be the same, I regarded the *plaintiff's declaration* as covering their obligation in either capacity, as no particular attention (as far as I remember,) was called to the pleadings in this point of view. The complaint, in this case, was not for damage in the actual carriage and safe delivery of the goods, after they were charged with their reception, so much as an act of *non feasance*, in not taking charge of the goods, supposed to be invited to their care *for carriage*.

"I am informed that the plaintiffs' declaration charges the defendants *simply as common carriers*, and not in the capacity or under any contract, as mere *receiving, forwarding, or transporting* agents. It is due to the defendants to notice this, and it will be for the Court of Appeals to determine how far this is material. If the Railroad, being *common carriers* from Charleston to Columbia, and in the former course of their business

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inviting freight, deliverable *at their Depot on the Neck*, had afterwards charged themselves with the receipt of freight from abroad, *at the wharves*, consigned *to their care*, and for their road, it is worthy of observation whether *their Road* and consequent responsibility, as common carriers, should not be considered as *theoretically*, and in the eye of the law, extended to *the wharves* themselves. It is clear, that if they were lawfully charged with the reception of the goods in question, they were liable for their delivery to the consignees or *the plaintiffs*, regarded either as *common carriers* or receiving and transporting agents."

(Signed)

"WM. RICE."

The defendants appealed, and now moved for a new trial on the grounds :—

1. That there was no evidence of delivery to, or acceptance of, the goods, by the defendants, as common carriers.

2. That his Honor admitted evidence of usage to set up an express special undertaking on the part of the defendants, as forwarding agents.

3. That his Honor charged the jury that there was no difference between the liability of the defendants as common carriers and as forwarding agents; whereas, it is respectfully submitted that the liability is distinct in nature and degree.

4. That his Honor charged the jury that the defendants had no power to limit their liability by proof of usage, but must do so by special notice to plaintiffs; whereas, it is submitted, that inasmuch as their liability was established by usage,—usage was competent to limit their liability.

Conner, for appellants.

Mowry, contra.

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The opinion of the Court was delivered by

O'NEALL, J. This case is presented in such a way, that we have been put to great difficulty in ascertaining the facts upon which it turns, viz. : whether the goods ever were received by the Railroad as a common carrier ?

The Recorder has very fully stated his views of the law, but he has really favored us with no statement of the case. The latter we desire to be furnished with in as clear, and concise a manner, as possible. It seems to me, a report should contain a condensed statement of a case, so as to be intelligible to every one, both upon the facts and the law. I have never approved of the practice of sending up notes of testimony : I well remember the difficulty experienced by the Court of Appeals, before I was a member of it, indeed before I was a Judge, from the sending up the notes of evidence and grounds of appeal, as a report.

Looking into the declaration, the third and fourth counts may make cases of the following kind : the third, that the plaintiffs consigned goods to the defendant to be received by it and taken care of, and then to be carried on its road to Columbia : that it did not take care of, and safely convey the same : fourth, that the defendant undertook to take care of the said goods, and while it had the care that it so negligently kept them that they were injured.

It may be that under these counts the defendant may be charged as forwarding agent. If the proof justified the conclusion that the Company ever had possession of the goods, and the Recorder had placed the case upon the true ground, the liability of the Company in that particular and not as a carrier, the verdict might be sustained.

But in fact the Company never had the possession of the goods. They were consigned to it, but the vessel sprung a leak on her voyage, the cargo was injured, and a general average bond had to be signed before the goods were delivered to the consignees. The Company was not authorized to give such a

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bond ; it, or rather its officer, Burdell, apprized the plaintiffs of that fact, and advised that Messrs. Heriot and Petit should be appointed their agent for that purpose. This was done. In the same letter the plaintiffs are told until the average bond is executed the goods are in the hands of Mr. Baker, the ship's agent. The goods were stored on the wharf, not by the Company, but I suppose by the agent. It therefore never had the possession in fact ; and if liable at all, it must be on a count for not receiving the goods after the execution of the average bond, and notice thereof, and then for not forwarding them to and by the Railroad.

Until the goods were in the possession of the Railroad Company, it is not liable as a common carrier. Certainly a very different rule applies to the liability of the Company, as a common carrier, and under an undertaking by it to receive and forward. In the former, when possession, actual or constructive, is shown, the Company is liable for all injuries and losses, except such as may arise from the act of God or the enemies of the country. In the latter it is liable for refusing to receive, unless it shows good cause for not receiving ; and, after receiving, then, if it does not use all the care which a prudent man would about his own business, it is liable for any injury or loss which may arise. When the goods are received by the Company for carriage, it is liable as a common carrier.

The Recorder's view therefore of the law was erroneous : and on the third ground the motion for a new trial is granted. The plaintiffs may add counts to their declaration charging the defendant for not receiving the goods, and also for not forwarding them to and by its own Railroad.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

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EDMUND G. HOLMES vs. R. & J. CALDWELL & Co.

Defendants, co-partners and factors, doing business in Charleston, employed plaintiff, and contracted to give him all their draying. Defendants afterwards dissolved their partnership, and the new firm, employed another drayman:—*Held*, that the contract terminated with the partnership, and that the new firm did not employ the plaintiff was no breach of it.

BEFORE WARDLAW, J., AT CHARLESTON, SPRING TERM,
1854.

The report of his Honor, the presiding Judge, is as follows :

“The defendants were Robert J. Caldwell, John Caldwell, and Winthrop B. Williams, late partners in trade as factors in Charleston. The action was *assumpsit*, brought to recover damages for breach of a contract, whereby the defendants, in consideration of plaintiff's purchasing drays &c. from Felix Meetze, and assuming to pay a part of the indebtedness of Felix Meetze to them, agreed that plaintiff, as drayman, should have all the business of their house.

“The whole evidence given in the case is subjoined, as the most satisfactory report which can be made to meet the grounds of appeal :

“*Felix Meetze*.—I had lived in Columbia when Robert and John Caldwell lived there ; I was unfortunate in business, and the result was my indebtedness to them about five thousand two hundred dollars. They came to Charleston, and carried on business as factors ; afterwards established a branch of their house in New York. I think W. B. Williams was their partner.

“I came to Charleston in the fall of 1845. Before I left Columbia, I had made an engagement to do the draying for the house of R. & J. Caldwell, at twelve and a-half cents for a

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bale of cotton from the railroad, and fares within the city according to the city regulations. I did all the drayage of the house for seven or eight years. Defendants did a large business; the draying was some years thirty thousand bales of cotton a year; one year the defendants did not have confidence in cotton, and I did but little business; the average was twenty thousand a year. I sometimes was obliged to hire out some of the work to other draymen.

"I came to Charleston to pay my debt to the defendants—the proceeds (not all) went to extinguish my debt. It was finally settled 1st May, 1852.

"John Caldwell, before that day, expressed a wish to have the balance closed, as he was in bad health. I said that I could not close it, without selling out my stock, drays, &c.; that I could make a fair sale to Mr. Holmes, if they would let him have the business. He said that any body I sold to should have the business—that is, any responsible man.

"About 15th of April, 1852, John Caldwell, Holmes, and myself, met by appointment at the Charleston Hotel. I told J. C. I had made arrangements to sell to Holmes, provided he would let Holmes have the business. J. C. replied, 'that is perfectly satisfactory; Holmes shall have the business, if he buys your stock.' I said to J. C. that Holmes was fearful that Wells (brother-in-law of J. C.) would interfere with the business, as two houses in Columbia that shipped to R. & J. Caldwell, and for whom I had formerly drayed, had given business to Wells. J. C. replied, 'So far as the two houses in Columbia are concerned, they are relatives of Wells, and of mine; I would not like to influence their business, it must be left in Wells' hands. But Holmes shall have all the rest of the work, both cotton sold here, and cotton sent to New York.'

"Holmes was present all the time. I asked him if he was satisfied, he said 'yes,' J. C. replied, 'I hope, gentlemen, we all understand each other.'

"I asked Holmes if he was satisfied, or would rather have it

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in writing? J. C. answered, 'I don't like to put myself under obligation—I hope, gentlemen, we all understand each other.' J. C. said he thought Holmes would have as much as he could do, at least for a year or two.

"Holmes and I had previously agreed on price, if he should be satisfied on conferring with J. C. He was not to buy unless he got Caldwell's business. I told him he could have the property at the price agreed on, and our bargain was completed.

"Holmes and I had been previously draying together for two years, and I owed him a balance, about four thousand two hundred dollars. I sold to him four negro draymen, nine horses, and ten drays and harness, and license. He gave me five thousand dollars for all, the balance I owed him was discounted, and he assumed four or five hundred dollars of my indebtedness to Caldwell—all out of the five thousand dollars.

"I delivered drays, &c., to Holmes first of May; he built a large stable, which was necessary for the work. He continued draying for the defendants till the fall following, then Wells got the business. I do not know that the defendants, or either of them, took the business from Holmes—I never talked to either of them about it.

"Holmes is industrious and capable, I never heard fault found with him. For a good while after losing this business he did little or nothing, then went into an office as a writer. He sold his stock; I bought back four drays and three horses—I didn't give so much as I rated them at in sale to him. His horses were unemployed; six or eight of them for some time, say three months; one horse died worth one hundred and twenty-five dollars; his draymen were not idle long; I hired them myself; all after awhile. The draying business is generally done under contract; some kind of business may be easily got, but a contract is hard to get; horse-keep worth fifty cents a day; shoeing worth one dollar a month for each horse. Plaintiff's time worth twelve hundred dollars a year. Stable cost much.

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"Holmes has been damaged by the loss of the contract; I cannot state the amount; he went to expense; fed the stock through the summer, when draying is an expense, and lost the business in the fall, soon as profits would have begun; I never, but one year, found draying sufficient to pay expense in the summer.

"Holmes paid me six hundred dollars more than I could otherwise have got; his object was to get this business. I think, with the business of the house, a dray contractor, when feed is not very dear, might clear two thousand dollars a year.

"The understanding of the contract was that Holmes was to take my shoes. It was a firm verbal contract. After Caldwell's observation about 'obligation,' I thought that I was going too far, and I said no more about writing.

"*Cross-examined.*—I afterwards saw Wells doing the business, and I did some for him; I think he has now sold out his stock.

"At the time of the sale, I think the firm consisted of the three defendants named. I don't know how long John Caldwell remained in it afterwards, nor whether he is now a partner. He is now president of the railroad. I think that sometime, perhaps in Oct. '52, I saw an advertisement of dissolution of the firm. I believe it was stated that John Caldwell had retired; I can't say when he retired, whether before or after Holmes quit draying for the house. There is now a new partnership—Robert Caldwell, W. B. Williams, Blakeley, and Edwards.

"I saw Holmes at the railroad prepared to do the business, and Wells doing it; I don't know who made the change, nor when it was made; Wells produced the receipts, which are the authority for draymen; Holmes seemed mortified; I can't say who were the consignees in the receipts.

"One day J. Caldwell said to me that Holmes had sued, and he regretted it—said but little.

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“Charles W. Simons.—I follow draying; knew Holmes in '52, he was draying for R. & J. Caldwell; his business ceased abruptly, latter part of September or in October; he was left with a large stock on hand, which had been kept at much expense in the summer for doing this business. A contract is indispensable, where one has a large stock. Two of his horses died; not one of them was worth less than one hundred dollars. Profits of such a business as his contract, properly conducted, should be considerable—estimated at two thousand three hundred dollars net a year. In summer there is usually a dead loss—can't say how much.

“Cross-examined.—The present house is Caldwell, Blakeley & Co., does less business than the old house.

“The business was taken from Holmes in the time of R. & J. Caldwell, I think; I don't know, however, when John Caldwell retired; all I know is, that I was surprised to see Wells doing the business which Holmes was to do.

“Nonsuit moved for—on grounds:

“1. There was no contract—only a promise of patronage.

“2. The contract, if any, was made by John Caldwell only—not by Robert Caldwell, or W. B. Williams.

“3. There is no proof of breach during the existence of the firm of R. & J. Caldwell & Co.

“The motion was refused: as the evidence then stood, there seemed such doubt as entitled the plaintiff to the decision of the jury upon the facts involved in these grounds.

“IN DEFENCE.—John J. Edwards.—I was clerk in the house of R. & J. Caldwell & Co., consisting of the three defendants; that house was dissolved 1st October, 1852, and a new house was formed, in which the partners were Robert Caldwell, W. B. Williams, J. B. Blakeley, and myself. Of the new house, Wells was retained as carrier about the 15th of October; Holmes continued up to that time, and a little while

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afterwards, say till his receipt in full, 26th October, 1852; that receipt is to Caldwell, Blakeley & Co., for three hundred and thirty dollars and seventy-four cents in full for drayage.

"Wells did a little business before 15th October, for parties in Columbia, who sent their receipts to him; but no business that the house could control was taken from Holmes before 15th October. The new house changed because of the course of Columbia houses; we had no fault with Holmes, but were compelled to change; John Caldwell was not in the house when the change was made, he had nothing to do with it; I never heard either of the partners say that he caused it.

"I instructed the jury, that a verdict for the plaintiff could be justified only by proof of a contract made and broken by the defendants; and that if the partnership of defendants was dissolved before the business was taken from the plaintiff, whatever might be the liability of John Caldwell, or of these defendants, in another form of action, there could be no recovery in this suit.

"The jury found fifteen hundred dollars for the plaintiff."

Defendants appealed and now moved for a nonsuit on the ground:

That the plaintiff sued upon a supposed contract of defendants to employ him as their carrier, and that he proved neither the contract declared on, nor a breach of any contract.

And failing in that, motion then for a new trial on the grounds:

1. That the plaintiff relied on evidence of a contract of the defendants, then trading under the firm of R. & J. Caldwell & Co., to employ him as the carrier of the firm: and it was proved that he did all the carrying of the defendants from April, 1852, when the contract was supposed to be made, till 1st October, 1852, when the partnership was dissolved: and therefore there was a complete failure of proof to sustain the plaintiff's action.

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2. That his Honor instructed the jury that the contract of which evidence was given, was a contract of R. & J. Caldwell & Co's., and that the employment for which they were bound expired with the dissolution of the partnership: but the jury differed from the Court in their construction of the law, and found that the contract extended beyond the partnership of the defendants.

3. That the verdict is contrary to law and evidence.

Petigrew, for appellants.

Martin, contra.

The opinion of the Court was delivered by

MUNRO, J. On the defendant's first ground of appeal, we concur with the Circuit Judge, in overruling the motion for a nonsuit for the reasons stated in his report.

A different question is, however, presented by the grounds for a new trial; and it is this, What was the nature and extent of the contract, between the plaintiff and the defendants, for the breach of which the present action has been brought?

The contract was verbal, and in order that we discover its real character, in reference, both to its subject matter and duration, we must refer to the contract that existed between the witness Meetze and the defendants, from the year 1845, down to the year 1852. Meetze, in his testimony says, he made an arrangement to do the draying for the house of R. & J. Caldwell at twelve and a-half cents for a bale of cotton from the railroad, and fares within the city according to the city regulations. In detailing the conversation that took place between himself, the plaintiff, and J. C. Caldwell, one of the defendants, on the 15th of April, 1852, the time when the contract between the plaintiff and the defendants is alleged to have been

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made, he says, "the understanding of the contract was, that Holmes should take my shoes." We are thus, by the aid of the testimony furnished by this witness, enabled to reach a point in this transaction, where we are fairly permitted to assume one thing at least, which is, that whatever may have been the nature of the existing agreement between this witness and the defendants prior to the 15th of April, 1852, the only change that was effected in it on that day, was the subrogation of the plaintiff Holmes, by the mutual consent of the parties, to all the rights and liabilities of Meetze, under it; in all other respects it was to remain unaltered.

Let us now see what was the extent of Meetze's rights under the agreement in question. Suppose, that shortly after Meetze's removal to Charleston, the defendants had abandoned the pursuit in which they were then engaged, and had embarked in another which no longer required his services; or suppose one, or all of the co-partners had died, thereby causing a dissolution of the firm, or that the co-partnership had been dissolved by mutual consent, as it was in 1852; could Meetze in any of these events have maintained an action against the defendants, similar to the present? But again, as mutuality is an essential element in all contracts, suppose Meetze had abandoned the defendants' service shortly after he had embarked in it; could the defendants have maintained an action against him for a breach of his contract? Unless an affirmative answer can be given to these several supposed cases, it is difficult to perceive how the plaintiff, who was merely subrogated to Meetze's rights and liabilities, and who was content to stand in his shoes, can be entitled to occupy a more favored position than could Meetze himself, if he were the plaintiff in the action.

But it was argued, that upon the faith of the defendants' agreement, the plaintiff was induced to make a large investment, in horses and drays, to enable him to fulfil his contract, and that in consequence of its unexpected termination, he has

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been subjected to a heavy loss, for which the defendants should be held responsible. The obvious answer to the argument is this, that the plaintiff should have guarded against such a contingency before he adopted the contract: and if he found that he could not protect himself against it by an express stipulation in the agreement to that effect, he had only to decline its adoption, and there the matter, so far as he was concerned, would have ended. But the same inconvenience must have happened to Meetze, had the dissolution of the firm taken place while he was a party to the contract: and if such an event had happened, in addition to the loss which he too must have sustained, by his investment in horses and drays, he might very well have swelled up the amount of his demand against the defendants, by adding to it another item, the expense and inconvenience to which he had been subjected by his removal from Columbia to Charleston.

But whatever cause of complaint, the plaintiff may have against the defendants on this score, it is clear that it cannot avail him in the present action.

There being, then, no pretence whatever, that the defendants have been guilty of a breach of their contract with the plaintiff prior to the dissolution of their co-partnership in 1852, the period, too, when we think the contract between them finally terminated, we are of opinion that the verdict of the jury is not only unsustained by the evidence, but that it is directly contrary to law. The defendants' motion for a nonsuit is, therefore, dismissed, but their motion for a new trial must be granted. And it is so ordered.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion granted.

Burke vs. Dillingham.

JOHN M. BURKE vs. BENJAMIN C. DILLINGHAM.

An order at March term, 1852, required the plaintiff to enter security for costs, on or before the ensuing term, or be nonsuited. Default was made, the cause was continued, and at March term, 1854, a motion was made for leave to enter security *nunc pro tunc*:—*Held*, that the original order was imperative, and the plaintiff out of court.

The continuance of the cause on the docket, and defendant's omission to enter up judgment of nonsuit, did not amount to a waiver of his rights under the order.

BEFORE WARDLAW, J., AT CHARLESTON, SPRING TERM,
1854.

This was a motion by plaintiff for leave to enter security for costs *nunc pro tunc*. The motion was founded upon an affidavit by plaintiff's attorney as follows:

“Personally appeared John Phillips, who being sworn, deposed: That he never was notified of any application for security for costs in this case, nor did he know that any order had been granted until this morning, when prepared and waiting for the trial of the cause, he was informed that an order had been granted on the 31st of March, 1852, by Judge WITHERS, requiring that security for costs be entered on or before the next ensuing term, in this case, or that the plaintiff be nonsuited: which to this deponent was a great surprise. That this plaintiff had prosecuted a cause against Thomas Trout, for which he had been notified of an application for security for costs, which he entered; but in this case deponent never has received any notice whatsoever of the application, or that it had been granted.”

The case was marked “continued” on the docket of October, 1853—but it was admitted that Mr. Walker, defendant's attorney, was not in Court when that entry was made.

His Honor refused the motion, and ordered a non-suit.

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The plaintiff appealed on the grounds :

1. That the order for security for costs was to the plaintiff and his attorney a surprise, and the plaintiff's motion should have been granted.

2. That the order of March Term, 1852, was inoperative, as the case had been continued for several terms beyond the term, when, if the security was not entered, the plaintiff was to have been nonsuited.

Petigrew, for appellant.

Mowry, contra.

The opinion of the Court was delivered by

WITHERS, J. An order for security for costs, to be given by the plaintiff, was made, to be complied with on or before the ensuing term, under penalty of nonsuit. The order was entered on the minutes of the Court—default was made, the case remained on the docket, was marked continued, once at least, probably oftener, but with no evidence that defendant's counsel, or the defendant himself, was apprised of this; when, at March Term, 1854, the fourth term after the order was made, and the third term after it became final and absolute, a motion was made on behalf of the plaintiff, that he be allowed to enter the security *nunc pro tunc*, upon an affidavit, that the plaintiff's counsel never had notice of the application for the order, nor of the order itself. The Circuit Court refused the motion for the plaintiff, and that determination is the subject of this appeal.

The case of *McCollum vs. Massey & McNeill*, (2 Bail. 606,) referring to some preceding cases of our own upon the subject of such orders as the present, took a distinction between orders that were interlocutory and administrative, and those which

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operate finally upon rights of parties litigant. It is affirmed that over the first class of cases, a succeeding Circuit Judge may exercise his discretion, restrained only by considerations of courtesy; over the last he may not—they are called *quasi* judgments, and, it is said, must be enforced, since they are final, after the time limited, or the happening of the contingency which makes them so. It is said in more than one of our cases, that in such case the plaintiff is out of Court, and his adversary may enter judgment as of nonsuit.

The rule thus stated has not been departed from. But this Court has recognized the obvious doctrine, that an advantage may be waived, and held that this was done where, notwithstanding default in securing the costs, the defendant pleaded to the declaration, and joined in the plaintiff's commission to examine a witness. *Fonville vs. Richey*, 2 Rich. 10.

It is accordingly urged now, that a waiver of this defendant is to be found in one or both of two circumstances, to wit.: first, the continuance of this cause on the docket, and, second, the omission of defendant to enter up judgment of nonsuit against the plaintiff.

The answer to this is, that there is no evidence whatever, that the defendant, or his attorney, had knowledge that this cause was kept upon the docket, or that it was ordered to be continued from one term to another. There is nothing, therefore, from which to infer his acquiescence in either, and so his waiver of the plaintiff's default. Nor can any such inference be drawn from the omission to enter judgment—for allowing that this may be done before the default, upon which it depends, has been judicially ascertained, still it is clear that the force and effect of a judgment cannot be evaded, simply because the party who gains it, forbears to reap the fruits—and if this plaintiff was out of Court, such omission cannot have the effect to restore him. It may also be well urged, that re-entering the cause on the docket, from time to time, was the act of the clerk; if the counsel of either party must be

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presumed to be implicated in this act, the presumption would be pointed rather at him for the plaintiff, since he had legally possession of the record, and had the interest and the office to push the prosecution of the litigation. The entry of continuance on the docket was the act of the Court, and no evidence appears at whose instance this was done in the present case.

It is unpleasant to hear that the plaintiff's counsel had no notice of the purpose to apply for the original order. We all agree that caution in this and all similar proceedings is eminently proper on the circuit, to insure against injury from surprise. It is the temper and the habit of each of us to conform to this rule of caution. But the watchfulness of the bar is necessary to the accomplishment of the end, especially upon the occasion when motions are to be heard. It may be, that an attorney is present, and yet does not hear what is proposed. Yet the Court would have to presume the contrary, as it must, that its minutes and records are known to those, at least, whom they immediately concern. At all events we are forced to hold, that an order for security for costs is properly granted, else mischievous confusion and uncertainty would follow—bad results for any species of government, or any department of it, worst of all for the judicial.

O'NEALL, WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

Smith vs. Hutchinson.

THOMAS SMITH vs. T. L. HUTCHINSON.

The Mayor of the City of Charleston holding a Police Court may lawfully impose a fine upon one who had violated a city ordinance, as the alternative of his prosecution; and if the party choose to pay it he cannot afterwards recover it back.

This was an action to recover twenty dollars from the defendant, Mayor of the City of Charleston. The Magistrate, Thomas O. Elliott, before whom the case was tried, made the following report:

“In this case, a nonsuit was moved for and granted. According to a well established practice, required and prescribed by the city ordinances, the Mayor attends every morning at the Guard House, to hear and determine the cases of persons who have been arrested and confined in the Guard House for offences during the night. In this manner the plaintiff was brought before the Mayor. After the report of the case, the Mayor said that the plaintiff should be punished; that if justice was done to the guardman, he should be prosecuted; that he fined him twenty dollars. Upon which, the witness, John Divine, asked to be allowed to pay the fine—asked the Mayor to let him pay the fine he had imposed on plaintiff—he said yes, he may pay it, and he must pay it over to the Captain of the Guard. He did pay it over to the Captain; but said, he hoped when the Mayor imposed another fine of twenty dollars, he would have a better cause.

“In cases of this description, it evidently belongs to the office to consider and determine in what manner such cases shall be dealt with and disposed of; and, in performing this duty, he must necessarily exercise a very large discretion. He (among other like matters,) is to decide whether the parties brought before him shall be compelled to pay the fines and

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penalties imposed by law, or not—or whether they shall be excused from the whole, or to abate the amounts *fixed* by law. He, in this case, decided that the plaintiff should pay twenty dollars.

“There is no evidence to show that he was to be imprisoned if he did not immediately pay it; on the contrary, it is plain that he was to be prosecuted for the whole, if he did not pay the amount specified immediately. The alternative was not proposed in any form, either pay twenty dollars, or go to jail, or be confined in the Guard House.

“The city ordinance impose a fine of twenty-five dollars on those guilty of riotous, noisy and disorderly conduct in the streets at night. This authorized the fine imposed, or this abated amount which he was to pay at once and be discharged, or be sued for the whole amount.

“I think the act complained of was within the scope of his official duty and discretion. Besides, the Mayor was not the receiver, nor had he any interest in the fine.

“I think the plaintiff not entitled to bring suit, either on duress or for recovery of alleged unlawful fees. Nor is the Mayor, for the acts thus done, in exercise of his official duty in this case, liable. How, under other circumstances and other forms of action, he may be liable, is not now to be considered.”

The plaintiff appealed on the grounds:

1. That his Honor erred in granting a nonsuit, when, by the Acts of the Legislature, and the Ordinances of the City of Charleston, the Mayor is prohibited from imposing a fine, and when by the evidence it was shown that the fine was imposed *colore officii*.

2. That his Honor should have decreed, that under the peculiar exigencies of the case, the plaintiff under the actual duress of

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imprisonment was constrained to pay the fine, and his payment thereof did not amount to such a willingness as to extinguish his right to recover the amount so paid.

3. That by the Acts of the Legislature, the Ordinances of the City of Charleston, the general principles of law, the defendant, as Mayor, had no right to *fine* or *receive* a fine through a subordinate officer, even if the plaintiff were willing to pay it: and so fining and receiving, he was bound under the circumstances to restore.

4. That his Honor erred in deciding that the defendant, as Mayor, had a large discretion in such cases, when, by *law*, his powers and duties are explicitly laid down; and

5. That his Honor should have decreed, that if the plaintiff did pay the money to defendant, or the party authorized by him to receive it, under the erroneous belief that the defendant had the power of punishing him, it was such a mistake of the law, as would entitle him to recover the amount so paid.

The appeal was heard in the City Court, October Term, 1854, before his Honor, the Recorder, who reported his decision, as follows:

“The report of the Magistrate in this case, of the grounds of his decision in nonsuiting the plaintiff, with a statement of the evidence in the case, is hereto annexed. Upon the facts, and the law applicable to them, I cannot concur in the judgment below. I, therefore, set aside the nonsuit, and order a *new trial*.

“The appeal, from the judgment of nonsuit below, it will appear, was made to this Court upon the grounds taken by the plaintiff’s attorney, and upon which the case was brought up, (a copy of which grounds are also annexed). As the grounds of appeal furnish, with the report of the Magistrate, the facts

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and the law upon which the plaintiff relies, it is not necessary, I should, perhaps, do more than transmit to the Court of Appeals, these materials for their judgment. It may not be, however, improper for me to say, that I consider the plaintiff's *first* ground as well taken and clearly sustainable.

"It is conceded that under the Acts of the Legislature and the City Ordinances in conformity therewith, the City Guard are authorized to arrest parties *for such offences* as the plaintiff was in this case *arrested* for. That the Mayor, the chief executive officer of the city, and peculiarly the head of the City Guard, has, in respect to these cases, the authority to hear them, as it were, in the way of inquiry, whenever they occur, (that is to say, in the morning,) and to dismiss, to direct to be prosecuted, and let to bail, all such offenders, according to his judgment, is not to be denied. But the question in this case seems to my mind, to rest upon the supposed *assumption* by the Mayor, *colore officii*, absolutely to *fine* the party arrested *and then in custody*; or, in other words, authoritatively to pronounce a definitive sentence. This power clearly is not given to him under the Acts of Assembly. The penalty for this offence, as I understand it, is twenty-five dollars, recoverable in the City Court, or any other Court of competent jurisdiction.

"It is possible that the *Mayor* upon announcing to the party that the legal penalty imposed by law for this offence was twenty-five dollars; (if the party voluntarily offered to pay it,) would be authorized to receive it. But it strikes me that even in such a case, although every one is bound to know the law, it should appear that the party was apprised or knew that the fine could not be *imposed* by the Mayor, *definitively* and *absolutely*, '*ex proprio vigore, autoritatis ejus*,' and that in case of no such voluntary offer on his part, the matter must be turned over to the competent authority for prosecution; and, as incident to this, the right of the party to discharge himself from custody, on giving bail."

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From the decision of the Recorder the defendant appealed, on the grounds :

1 Because the payment of the twenty dollars was voluntary, and cannot be recovered back.

2. Because it was lawful for the Mayor to receive the amount of the fine fixed by ordinance, for riotous or disorderly conduct, without prosecution ; and it is also lawful for him to receive a less amount, as the alternative of a prosecution, if the party choose to pay it.

3. Because the plaintiff did not pay the twenty dollars, therefore cannot recover it back.

4. Because the Mayor did not receive the money, and is, therefore, not liable in an action for "money lent and advanced, and had and received, for the use of said Smith."

5. Because the nonsuit was properly granted, and should not have been set aside.

Porter, City Attorney, for appellant.

Anderson, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case it may be useful to ascertain, whether the defendant, the Mayor of the City, was guilty of imposing, without what he supposed to be legal authority, a fine.

The sixth section of the Ordinance of 22d October, 1821, (City Ordinances, 54,) provides "that after tattoo, or the nine or ten o'clock bell, as the case may be, all clamorous singing, whooping, or other obstreperous, wanton and unnecessary noises, calculated to disturb the peace and quiet of the city, are hereby prohibited under a penalty (in case the offender or

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offenders be a white person or persons) of twenty-five dollars, recoverable by prosecution in the City Court." The Mayor, by the first section of the Ordinance of the 25th of August, 1846, (City Ordinances, 165,) is charged to be "vigilant and active at all times in causing the ordinances and laws for the government of the city, to be duly executed and put in force." By the third section, he is authorized daily to hold a Police Court, for the "examination of all slaves, or *other persons*, committed to the Guard House."

The plaintiff was one of these who was taken up by the guard, and committed to the Guard House, for the violation of the sixth section of the Ordinance of 22d October, 1821. When the facts of the case were reported to the Mayor, he said the plaintiff should be punished, if justice was done to the guardman, he (the plaintiff) should be prosecuted, that he fined him twenty dollars; upon which Divine paid the money for the plaintiff. I do not understand by all this anything more than what the Mayor might rightfully do, so far as the plaintiff was concerned. He simply rebuked him for his conduct, told him he should be punished, and that for his conduct to the guardman he ought to be prosecuted, but finally wound up by telling him, to escape these consequences you must pay a fine of twenty dollars. According to the ordinance, he should have directed him to be sued in the City Court for the fine of twenty-five dollars. The plaintiff certainly has no cause to complain of the Mayor's act, whereby he escaped with a less sum. It is worthy of remark, too, that the Mayor, sitting in a Police Court, has the right to judge primarily that the fine has been incurred, and this is all which I understand the Mayor as doing. The fine was incurred as far as twenty-five dollars, and the plaintiff's friend paid a less sum, which the Mayor permitted. Conceding this to have been irregular, and the money to have been paid without warrant of law, can the plaintiff recover it back? I am clear he cannot. For beyond all doubt, it was a voluntary payment. He, or his friend Divine, had nothing to do, but

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simply to have contested the point, and said to the Mayor, I will abide the decision of the City Court, and if you choose to prosecute for violence to the guardman, I am ready to answer; and then if the Mayor had improperly confined the plaintiff, or by any show of force had coerced payment, it might have been said that this was money obtained by duress, or proceedings having the color of law. But the plaintiff, instead of thus acting, was permitted to pay, and did pay less than he was legally bound to pay. The case of *Robinson vs. The City Council of Charleston*, 2 Rich. 317, shows that a payment of that which could not have been legally required, if done in ignorance of the law, was a voluntary payment, and could not be recovered back. Certainly that case goes much further than this.

The motion to reverse the Recorder's decision, and to affirm the Magistrate's judgment, is granted.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA,

Columbia—May Term, 1855.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL,	HON. JOSEPH N. WHITNER,
“ DAVID L. WARDLAW,	“ THOMAS W. GLOVER,
“ THOMAS J. WITHERS,	“ ROBERT MUNRO.

GEORGE SAWYER *vs.* JACOB LEARD.

In trespass *quare clausum fregit*, the testimony of the sheriff that he did not levy on the land in dispute, will not be received to contradict the terms of his own deed and the entry of his levy.

BEFORE O'NEALL, J., AT LEXINGTON, MAY, EXTRA
TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

“ This was an action of trespass, *quare clausum fregit*, in which the title of the plaintiff to the land as opposed to that of one Samuel Crafts, and the right of the defendant to cut the timber on the land of the said Samuel Crafts, became necessary to be investigated.

“ The land in dispute was once the property of John D. A.

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Murphy. He took the benefit of the bankrupt law of the United States, and M. H. Pooser was appointed his assignee on the 11th March, 1848.

“Pooser, in 1844, conveyed a large tract of land, embracing within its boundaries two hundred acres, in dispute, to O. B. Hilliard, and Hilliard conveyed, on the 1st August, 1844, the same land to C. B. Northrop. Neither of these deeds was recorded until September, 1851.

“In the meantime, Pooser, without styling himself assignee, on the 15th September, 1848, sold and conveyed the two hundred acres of land in dispute to Michael Sharpe, and the deed was recorded 23d November, 1850. On the 15th February, 1851, Michael Sharpe sold and conveyed the same to Samuel Crafts, and on the 27th March, 1851, that deed was recorded. Both Sharpe and Crafts had actual possession of the land in dispute under each of their deeds. In the last deed from Sharpe to Crafts, the right to cut the timber on the land was reserved to M. H. Pooser.

“It became necessary to sell the land and all the property of J. D. A. Murphy, which had been conveyed to Hilliard and Northrop, and which had remained in the possession of the assignee, Pooser. Accordingly, on the first Monday in May, 1852, as the agent of Northrop, and under the levy of various executions, one of which, to wit: Robinson and Caldwell's, was older than the deed to Sharpe, Isaac Vansant, Esq., Sheriff of Lexington, sold a tract of land containing five thousand two hundred acres, and on the 18th of the same month, Northrop and himself conveyed it to Sawyer, the plaintiff, who is in actual possession of a part of the land conveyed to him, but between two and three miles from the land in dispute, of which Crafts was in possession before the sale, at the time it took place, and when Leard cut the timber, the cause of this action. The description in the deed to Sawyer, and in the Sheriff's written levy on the execution covers the land in dispute. The advertisement clearly shews that it was not intended to sell the

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land in dispute. The timber privilege on the land was advertised and sold to Northrop before the land to Sawyer was sold. Northrop transferred his purchase of the timber privilege to Leard, and under this right he cut the timber, for which this action was brought, in a clearing made by Crafts, and of which he (Crafts) had actual possession.

"The Sheriff, Vansant, was offered, to prove that he did not levy on the land in dispute. I thought this was competent. It was not to alter, contradict or vary his deed. *It was to show he had no authority to sell the land in dispute.* He proved most distinctly and clearly that *he never levied on the land in dispute.*

"I was of opinion, and so told the jury, that the deeds of Hilliard and Northrop, not recorded within six months, and not recorded until after the deeds of Sharpe and Crafts were recorded, could not prevail over the deeds to Sharpe and Crafts, which were recorded. So, too, I thought the fact that Pooser in his deed to Sharpe did not recite his character of assignee could not help the plaintiff.

"The fact whether Vansant was right in stating that he did not levy on the land was left to the jury. They found for the defendant."

The plaintiff appealed, and now moved this Court for a new trial on the grounds :

1. Because his Honor, the presiding Judge, erred in admitting the testimony of Isaac Vansant, Sheriff, to contradict the record of the levy made by him as Sheriff on the tract of land on which the trespass was committed, and the deed of conveyance made by him and C. B. Northrop to the plaintiff.

2. Because his Honor, the presiding Judge, erred in charging the jury that the conveyance of Isaac Vansant, Sheriff, and C. B. Northrop, to the plaintiff, does not convey the timber sold

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by the former at Sheriff's sale, and purchased by the said O. B. Northrop.

3. Because his Honor erred in holding that the deed of M. H. Pooser to Michael Sharpe, took precedence of the deed made by him as assignee of J. D. A. Murphy in bankruptcy, to O. B. Hilliard, although the latter deed was executed by him in the execution of his trust more than four years before the former.

Booser, Fair, for appellant.

Desaussure, contra.

The opinion of the Court was delivered by

GLOVER, J. The Circuit Judge admitted the Sheriff to prove that he did not levy on the land in dispute, and the first ground of appeal submits that this contradicted the levy made by him as Sheriff, and also the deed executed by him and Northrop to the plaintiff. It is conceded that both the entry of the levy by the Sheriff and his deed embrace the land in dispute.

We would not, without qualification, declare that a Sheriff shall not be permitted to correct mistakes in his entry of levy, even in his Sale Book. The Act of 1839, (11 Stat. 26, sec. 6,) directs him to make an entry of all his levies, intending to preserve a permanent memorial of them, not only for his direction, but for the benefit of all parties interested. Before he has conveyed the property sold to a purchaser, he may amend his entry and make it conform to the truth; but it may prove dangerous in practice to permit such amendment after he has executed a deed conveying the property, or to permit parol evidence to explain it, and thereby contradict his deed.

The Sheriff proved that he never levied upon the land in dispute, and if this contradicted, altered or added to his deed, it was inadmissible.

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In ascertaining the intention of a party, which must control in the construction of his deed, we must collect it from the language of the deed itself, and evidence should not be admitted to explain, unless by the terms of the deed such intention cannot be discovered without resort to other evidence—or where an ambiguity has been raised by parol, it may be removed by parol. Does the evidence of the Sheriff, received in this case, contradict or vary his deed? The levy and deed embrace five thousand two hundred acres, and he was permitted to prove that he never levied on the land in dispute, which constituted two hundred acres of the land described in the plaintiff's deed. This is a variance, and manifestly contradicts a deed by which the quantity is clearly set out, and without any such ambiguity as requires explanation. If the Sheriff's deed had embraced all the land which had been conveyed to Hilliard and Northrop, it would be competent to show by parol how much had been conveyed; but it would not be competent to shew that a part and not the whole was intended. (*Barkley vs. Barkley*, 3 McC. 269.)

In *Locke vs. Whiting*, (10 Pick. 279,) it was held, that where a mortgage deed purported to convey the whole estate, parol evidence is not admissible to prove that the deed was intended by all the parties to convey a moiety only, and that the whole was included by a mistake of the scrivener.

The law requires that conveyances of real estate shall be by deed, and this not only furnishes the evidence of the agreement between the parties, but, when recorded, the public is advertised and learns the intention of the parties from an examination of their deeds in the Registry.

It may be shewn that the Sheriff had no execution justifying his levy and sale, and, therefore, no authority to sell; as this contradicts only a recital in his deed, which is not even *prima facie* evidence of his official authority. Here the evidence is offered to shew that he sold less than his deed specifically conveys, and if admissible, it may be competent to shew

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that his levy embraced no land described in his deed. Where there is fraud or mistake, and the facts authorize it, a deed may be declared void or set aside *pro tanto*; but the fact of such mistake should not be enquired into in a collateral way, and thereby contradict the express terms of a deed.

Should a Sheriff sell or convey land not subject to the lien of a judgment, the title of the owner is not necessarily defeated by such sale, nor is he without a remedy. In this case, the property is described without any ambiguity, and the intention of the Sheriff is manifest, and should parol proof be admitted which contradicts his deed, without any allegation of fraud, it would violate a safe and well-established principle of evidence.

It is not necessary to notice the other grounds taken in the appeal or the argument.

Motion granted.

WARDLAW, WITHERS, and MUNRO, JJ., concurred.

O'NEALL and WHITNER, JJ., dissented.

Motion granted.

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C. H. NETTLES, FOR HIS ASSIGNEES, *vs.* WM. HUGGINS.

After assignment under the Act, for the benefit of creditors, a debtor of the assignor, who was also his surety, paid the debt for which he was surety:—
Held, that he could not set up the payment as a discount to the action by the assignor to recover, for his assignees, the debt due by the defendant.

BEFORE WHITNER, J., AT DARLINGTON, SPRING TERM,
1855.

The report of his Honor, the presiding Judge, is as follows:

“The plaintiff, a merchant, made an assignment under the A. A. of this State, for the benefit of creditors, 13th January, 1853.

“The action was founded on an account for goods sold and delivered previously, and included in the assignment.

“The defendant filed a discount to set off various demands, and amongst them, one arising on a note given by C. H. Nettles for money borrowed, with defendant Huggins and — Best, as sureties, 4th February, 1852, due 1st January, 1853, and paid off by sureties, in equal proportions, 2nd April, 1853.

“The discount was allowed by the jury, except the last item, and the plaintiff had a verdict for a small amount.

“The facts were beyond dispute, and if defendant was entitled to set off his demand, the verdict should have been for him and for the balance according to his legal rights.

“I felt constrained to instruct the jury, that the question must be determined by the state of things at the time of the assignment, when the rights of creditors attached, and defendant having then no subsisting legal demand in this particular, that this item should not be allowed. It is an extreme case, leading to a result different from that which must strike

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the mind as just. I shall be glad to find the rule less stringent than I have supposed."

The defendant appealed and now moved this Court for a new trial:

1. Because his Honor, the presiding Judge, erred in instructing the jury, that they were not at liberty under our discount law, to allow as a discount, the amount paid by defendant as surety on plaintiff's note, after the date of plaintiff's assignment, although the note was due before the assignment, and paid by defendant before plaintiff's action was brought.

2. Because the plaintiff suing for his assignees, on an open account, was entitled to no better position in law than if he had sued for his own benefit.

3. Because the rejection of the defendant's discount by the jury, under the circumstances of this case, was contrary to law and evidence.

Law, for appellant.

Dargan, contra.

CURIA, PER O'NEALL, J. This case it seems to me is settled by *Tibbetts vs. Weaver*, 5 Strob. 144.

In that case it was held that after a voluntary assignment by an insolvent of all his choses for payment of his debts, payment by a debtor of his open account to the plaintiff who sued for his assignees, could not defeat them. If a payment could not be allowed in such a case, much less can a discount, arising after the assignment, have that effect.

In this case, the money was paid after the assignment by the defendant, the surety, in discharge of a debt of the assignor

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which could only take place and be paid according to the deed. To allow the surety to pay and set up the amount so paid as a discount would defeat the rights of all the creditors under the deed.

But it is certainly well settled by our decisions that nothing can be allowed against the assignee, which did not have a perfect legal right of enforcement before the assignment.

In *Williams vs. Hart*, 2 Hill, 483, it was held, in an action by the assignee of a sealed note, that a note given to the defendant by the obligee after the assignment, although a renewal of a note given before, could not be set up as a discount.

So in *McAlpine vs. Wingard and Miller*, and *The Same vs. Sondly*, 2 Rich. 547, it was held that an independent demand, not due at the time at which the note against which it was attempted to be set up as a discount was transferred, notwithstanding such transfer was with notice, could not be allowed as a discount.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

State vs. Bosse.

THE STATE vs. LOUIS BOSSE.

One convicted under Statute 22 & 23 Car. II. c. 7, of burning a house in the night time, is entitled to his clergy.

When a new felony is created by statute, clergy is incident thereto unless expressly taken away.

Where an English statute, made of force in this State, contains a provision that the felon may elect to be transported, it will be enforced as if there were no such provision in it.

BEFORE WARDLAW, J., AT PICKENS, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

“The prisoner was indicted under the Stat. 22 & 23, Ch’s. 2, for burning in the night time, the house of Corde Otten.

“After the arraignment of the prisoner, and the announcement of his readiness for trial, I perceived that the counsel of the prisoner as well as the Solicitor, were proceeding under the assurance that the offence charged in the indictment was a clergyable felony ; and with a view to prevent surprise, I expressed doubts which I entertained on that point, but said, that the question would properly come up after conviction, when benefit of clergy might be prayed, and that if—after argument—I should not then be of opinion, that clergy was allowed by the Statute under which the indictment was framed, I would not venture to pronounce sentence of death without consulting my brethren. If the course I took has occasioned surprise, I regret it much ; but I cannot see how the silence which I might have kept about my doubts, would have been more advantageous to the prisoner, than were my intimation of the extreme consequences that might be involved in the trial, and the stronger appeals which upon the assumption of such consequences, were addressed to the jury.

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“The case made by the testimony was as follows :

“The prisoner is tall, stout and middle aged ; a German by birth, speaking English very imperfectly. He is a gardener, and is tolerably well educated, particularly in botany. He worked as a day laborer for about a year, next preceding this affair, on the Blue Ridge Railroad, in the neighborhood of Walhalla—a new settlement of Germans—but seemed to be little, if at all, acquainted with the people of that settlement, except Dr. Norman, whose patient he had been. There was no reason to suppose that he knew Corde Otten, or had any ill-will toward him. He was ordinarily quiet and peacable, civil and industrious, but was addicted to occasional drunkenness, and when in liquor was *exalted*, lively, excited, wild, seeming not to know what he did.

“A house in Walhalla was building for Corde Otten, between Biemann’s Hotel and Stucke’s residence, about two hundred yards from the former, and forty yards from the latter : its end was toward the street, and there was a piazza at one side : it was of two stories, with a kitchen of one story attached to the back end ; in the lower story were a front room without a fire place, and a back room, between which and the kitchen a chimney had been completed, affording a fire place to each ; the floors of the house had been laid, the walls and ceiling put up, and everything finished except the plastering, the doors, the sash, the columns, the handrails, and the banisters. The floors were covered with shavings.

“In the afternoon of Saturday, March 10th, 1855, the prisoner, with three other laborers, was in the store of Dr. Norman, where he had dealt before. He bought some tobacco and matches, being a smoker of the pipe. He was elevated or partially intoxicated, and had a quart jug about half full of liquor.

“That night, three young Germans, who lived at Walhalla, Bulwinkle, Calenberg, and Stucke, all unmarried, had been sitting without fire, (the weather being moderate) at Stucke’s ;

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and when the first named two came out to go home about 11 o'clock, they observed an unusual light at Otten's new house. They called Stucke, and all proceeded toward the house. They saw that the house was on fire, and that there was a man in it, who passed the windows of the back room, and was throwing his arms about, stooping and rising, as if stirring something, or lifting and carrying armfuls of something. Fearing that more than one man was in the house, Bulwinkle and Stucke ran to Biemann's for help, Calenberg staying to watch. Calenberg saw that the fire was burning against the wall of the back room, on a different side from that where the chimney was; that it had burnt through the floor and had fallen underneath, and that the man inside (who proved to be the prisoner) was throwing shavings upon the blaze; that when the blaze reached the ceiling he came out into the piazza and looked into the back room through a window, then came out of the house into the street and toward Calenberg, who, fearing that he was armed, retreated backward, he following. Bulwinkle and Stucke returned, bringing Biemann and others with them; all excited, alarmed, and in a hurry. Bulwinkle seizing the prisoner, asked him why he set the house on fire? The prisoner answered, "I did not intend to burn it—I thought I was in the *bush*." Bulwinkle asked where he got the fire, and he said that he had bought matches of Norman, and always carried them in his pocket.

"The house was consumed, and the prisoner was retained, having made no attempt to escape. The witnesses who were examined said that in their anxiety and hurry they paid no attention to the prisoner's condition, and could not say whether he was drunk or not.

"After full argument of the case, I instructed the jury that the first and most material question (supposing the facts to be as stated) was, whether the burning had been accidental, that is without or contrary to any intention of the prisoner, as if it had proceeded from a spark out of his pipe, or from a match

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carelessly used without evil intention, or from fire kindled in the chimney and carelessly allowed to pass to the shavings, or from some involuntary act suggested in a drunken dream. But that if it should be found not to have been accidental, then the questions would be, was the prisoner so drunk as not to know what he was doing? and if he was, could drunkenness excuse crime? or rebut the inference of such malice as constituted an ingredient of the offence charged?

“I held that drunkenness was not an excuse for crime; that the term *maliciously*, used in the statute, which created this offence, means *with any evil intention*; that where nothing to the contrary appears, the intention to do an act should be inferred from the act and should be held evil if the act is evil; that if a drunken man was in no worse condition than a sober one, he was not by the law put into a better one, but was a responsible being, to whom the same rules apply which in the same predicament would apply to the sober; and that if the prisoner, without accident and without any explanation besides drunkenness, applied a match to the shavings, and heaped shavings on the fire, with such volition and intention as a drunken man could exercise, it should be inferred that he wilfully and maliciously burned the house.

“When the jury, after a long absence, returned into court, the clerk asked, ‘Gentlemen of the jury, have you agreed upon your verdict?’ The foreman nodded, and handed the record, from which the clerk read aloud, ‘Guilty, but recommended to mercy. Mansel, Foreman.’ One of the prisoners counsel requested that the jury should be polled. I asked if he had any reason for doing so? He answered that he had no reasons, but had suspicions. I was unwilling to countenance the practice of formally polling the jury whenever it might be requested, as a matter of course; and I directed the clerk to proceed solemnly, according to the prescribed form of receiving a verdict in a case of felony. He demanded anew, ‘Gentlemen of the jury, have you agreed upon your verdict.’

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Then he read the verdict again, and turning to the jury, said, 'This is your verdict, so say ye all.' I then spoke to the jury, and said, 'Now is the time, gentlemen, for any one of you to speak, if he is not agreed to this verdict.' All remained silent, and I ordered the verdict to be recorded."

The prisoner appealed on the grounds:

1. Because the counsel for the defendant having announced themselves ready for trial, were taken by surprise, when his Honor, the presiding Judge, announced it as his opinion, that the offence with which the prisoner was charged was a capital felony, not clergyable, and the prisoner being a foreigner, and unable to communicate intelligibly with his counsel, they were unable to get information of evidence in his defence.

2. Because his Honor, the presiding Judge, erred in announcing the offence of house burning under the English Statute of 22d and 23d, Charles II., made of force in this State, a capital felony not clergyable.

3. Because his Honor erred in charging the jury, that the only material question of fact for them to decide, was, whether the firing of the house was accidental or not, as drunkenness was not admissible in any case, as a circumstance from which the jury might infer a want of malice or intention.

4. Because his Honor also erred in charging the jury, that if the prisoner set fire to the shavings in the house (which was unfinished and unoccupied) with as much volition and intention as a drunken man could have, he was guilty.

5. Because, when the jury came in, and the clerk demanded, "have you agreed upon your verdict, gentlemen," the foreman, without answering "yes," handed up the verdict, which being read, the counsel for the defendant moved his Honor, the presiding Judge, to poll the jury, which he refused, but required the clerk again to read the verdict, and demand of the jury,

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"Is this your verdict, and do ye all so say?" They all, including the foreman, remained silent, and did not answer yes, whereupon the Judge ordered the verdict to be recorded, the foreman never having answered "yes."

6. Because the verdict of the jury was contrary to the law and evidence in the case, and as a conviction of a capital offence, not clergyable, is an extreme hardship.

Orr, for appellant.

Reed, Solicitor, contra.

The opinion of the Court was delivered by

O'NEALL, J. The prisoner was indicted and convicted under the Statute 22 & 23 Car. 2, c. 7, for burning a house in the night time; the punishment declared by it is, "Every such offence shall be adjudged felony, and the offenders and every of them shall suffer as in case of felony." 2 Stat. 521, § 2. The 3d section is a mere proviso, that no attainder for any of the offences made felony by virtue of this Act, shall make or work any corruption of blood, loss of dower, or disinheritance of heir or heirs. The 4th section provides, that "persons convicted of any the offences made felony by virtue of this Act as aforesaid, (to avoid judgment of death, or execution thereupon for such his offence,) shall make his election to be transported to any of his Majesty's plantations;" and that judgment shall be given accordingly.

The question first made is, whether this Act, which was made of force in 1712, can now be enforced? There is no doubt that the punishment of transportation cannot be enforced. In the *State vs. Kirkpatrick*, 2 Brev. 440, this circumstance was held not to be enough to defeat the operation of the statute. The same ruling was made in the *State vs.*

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Dunnavant, 3 Brev. 9; and in the *State vs. Garey*, tried before me at Newberry, Fall of 1833. See note, 3 Brev. 9.

At the instance of the prisoner's counsel, we have considered the question, whether clergy is taken away from this offence. The well settled rule is, "that when a statute makes a new felony, clergy is incident thereunto, unless it be specially taken away by Act of Parliament" in Great Britain, or of the Legislature in this State. 2 Hale's, P. C., Chap. 45, p. 380. The same is repeated in Hawkins, Book 2, Chap. 33, § 24.

These authorities from the greatest masters of the Criminal Law, are decisive of the question. For this is a new felony created by statute, and clergy is not expressly taken away. The argument that it is taken away rests upon implication merely, arising from the provision substituting transportation for judgment of death. It might well be, even in England, that if the prisoner refused to make this election, the Court must allow the clergy under the plain principle, that this was a new statutory felony, and that from it clergy had not been taken away. In this State, however, there can be no difficulty. For the clause allowing an election of transportation cannot be at all enforced, and hence it is the same as if struck out of the statute. This leaves the offender, to be punished "as in case of felony," and then there can be no doubt clergy must be allowed. The proviso in the 3d section cannot make the punishment any more. For the same is found in Stat. 1 Jas. 1, c. 11, (2 Stat. 508,) making bigamy a felony, and declaring the offender "shall suffer death, as in case of felony." Under it the offender convict has been always allowed clergy.

In the *State vs. Garey*, who was convicted of killing a horse in the night time, under the Stat. 22 & 23 Car. 2, c. 7, I held in 1833, that the prisoner was entitled to his clergy. So in a case in *Walterboro'*, several years ago, where a prisoner was convicted of burning an out-house or stable having fodder in it, I held that the prisoner was entitled to clergy.

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For burning a barn having corn in it, clergy is ousted by the Stat. of 28 Hen., 8, c. 1, (2 Stat. 459.)

In this case we are satisfied that the prisoner is entitled to his clergy.

The prisoner's counsel requested, that if we should obtain this conclusion his motion for a new trial might be dismissed; it is accordingly so ordered, and the prisoner is adjudged guilty of a clergyable felony, and for that judgment will be awarded.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Mayrant & Moses vs. Miller.

S. MAYRANT AND F. J. MOSES vs. J. L. MILLER ET AL.

The Circuit Court of Equity ordered an issue at law, and "that either party be at liberty to prosecute an appeal to the Law Court of Appeals:"—*Held*, that the appeal in such cases should be to the court ordering the issue: the Law Court of Appeals refused to hear it.

BEFORE O'NEALL, J., AT SUMTER, SPRING TERM, 1855.

Under a bill in Equity between the parties for partition, the Circuit Court of Equity made an order, that an issue at law, in the nature of an action to try the title, be made up, &c; "that either party be at liberty to prosecute an appeal to the law Court of Appeals, and that the final result be certified to this Court."

The jury found for the defendants; and the plaintiffs appealed, and now moved this Court for a new trial.

De Saussure, Richardson, for appellants.

Miller, Law, contra.

PER CURIAM. In this case the Court of Law Appeals have conferred with their brethren of the Equity Court of Appeals, and have come to the conclusion that the practice, settled in 1812, by the Court of Appeals in Equity, in *Taylor vs. Mayrant*, 4 Eq. Rep. 514, should be untouched. According to that case, the appeal should be to the Court ordering the issue.

This Court declines, therefore, to hear the appeal. The case is stricken from the docket.

O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurring.

Columbia, May, 1855.

WILLIAM R. TAYLOR vs. DORCAS WILSON.

The donor conveyed a negro girl to a trustee "for the support of H. C., the daughter of my wife, for the term of twenty-one years, then, at the expiration of that term, to be vested in H. C.," absolutely. H. C. afterwards married and died before the twenty-one years had expired:—*Held*, that the marital rights of her husband had not attached on the property.

BEFORE O'NEALL, J., AT RICHLAND, SPRING TERM,
1855.

The report of his Honor, the presiding Judge, is as follows :

"In this case, which was an action of trover for a negro woman slave named Eliza, the plaintiff claimed under a deed, whereby Middleton Fair bound himself, his heirs and executors, 'to warrant and vest the property, the heirship of my wife, Mary Ann Fair, in Hiram Addison for the support of Hester D. Carroll, the daughter of my wife, Mary Ann Fair, for the term of twenty-one years, then, at the expiration of that term, the negro girl, Eliza, with one-half of the money, principal and interest, being a part of my wife's, Mary Ann Fair's, heirship of the estate of Joseph Carroll, deceased, to be vested in Hester D. Carroll, her heirs forever.' The deed bears date 11th July, 1838.

"Hester D. Carroll married Wm. R. Taylor, and died before the twenty-one years had expired, and this action was also brought five or six years before the same period.

"The defendant, who is the Widow of Hiram Addison, refused to give up the negro woman slave to the plaintiff, who claimed her by virtue of his marital rights.

"I held that his wife had no legal estate in the woman, Eliza, upon which his right, as husband, could attach, and ordered a nonsuit.

"The plaintiff appeals on the ground, that 'according to a

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correct construction of the deed executed by Middleton, the marital rights of the husband attached to the slave in question so as to sustain the action.' "

Gregg, Bellinger, for appellant.

Bauskett, contra.

CURIA PER O'NEALL, J. In this case, the plaintiff on the plain principles of law, cannot recover. His wife had neither possession nor right of possession. The title, according to the deed, was in Addison, who was to apply the slave for the support of the plaintiff's wife for twenty-one years. This even in land, and under the Statute of Uses, would not be an use executed. For there was something to be done by the trustee, the application of the trust property for the support of a minor and afterwards a married woman.

In personal property the legal estate under such a deed is beyond all doubt in the trustee. *Burnett vs. Rice*, Speer's Eq. 579. The wife dying before the term expired, it was impossible she could have either right of property or possession: and it is therefore idle to talk about the marital rights attaching.

Neither, even if the doctrine of merger applied to personal property, could that help the plaintiff. For there could be no merger of the estate of the trustee, in the ultimate rights of the *cestui que trust*. They are distinct estates and rights.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ. concurred.

Motion dismissed.

Columbia, May, 1855.

WALTERS & WALKER *vs.* MCGIRT, MEEKINS & SON.

In cases on the inquiry docket, the cause of action being admitted, and the only question being as to the amount of damages, full proof as in other cases is not required.

Interest is chargeable on factor's accounts for advances or purchases.

A charge for commissions on the balance, of a factor's account sued for, will not be allowed.

BEFORE WHITNER, J., AT MARION, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

"This case was on the inquiry docket, and no appearance having been entered, the plaintiffs proceeded to execute their writ. Mr. Phillips presented himself, and claiming to represent defendants, was permitted to cross-examine the witness, and address the jury. I have since been served with *eleven* grounds of appeal; but having no notes of the case, and being unable to procure a copy of the account sued on, I am under the necessity of reporting from memory.

"The original books of plaintiffs were in court, as also the original drafts and bills of lading, or shipping receipts, as they were perhaps called. Mr. Pinckney made the original entries, except, as I understood it, in two instances: wherein, though Mr. Pelot, a clerk in Charleston, had made the entries, the witness had made the shipments and forwarded the invoices, and in that way proved the delivery. I cannot specify the items, nor were they brought to my notice particularly, though the objection was urged in argument. Bills having been furnished, and no objections made known to the house, I thought this proof might satisfy the jury of the delivery.

2d. The witness proved that the charges for commissions, such as made, were in accordance with the usages of trade for

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such service. Plaintiffs accepted, and advanced upon drafts drawn on them; purchased, and forwarded goods, according to order; and procured money for defendants by indorsements on accommodation paper, and charged commissions on each, which I thought legitimate, and submitted to the jury according to the proof.

"3d. I did not think the charge of commissions on the balance struck was a proper charge, but the jury thought differently, and perhaps correctly, understanding mercantile usage better than I did—counsel having congratulated himself on the well-known intelligence of the foreman, a merchant of high-standing it was said, to whom I was accordingly much disposed to defer. The balance in fact being but an advance, was perhaps properly subject to a charge of commissions, on final adjustment.

"4th. The objection urged on this ground I heard mentioned in the progress of the case, and especially in the argument, and requested to have it pointed out. This was not done; and leaving the jury to correct, if such error was committed, I looked no further.

"5th. I thought the charge of interest on advances, especially on the proof of universal usage, was legitimate.

"6th. No instruction was made of defect in the declaration, in the particular indicated in this ground; nor was my attention in any way called to the state of the pleading. I am not satisfied such a count was necessary.

"7th. I know nothing of the matter charged in this ground; my attention not having been called either to the charge, or any omission to produce letter.

"8th and 9th. In reference to these grounds, I can only say, the jury were instructed to note these particulars, and to reform the account in such way, as to deduct any double charge of commissions for the same service, or of interest upon the same sum, whether this may have been done on a balance struck, or otherwise.

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"10th. On the subject of this ground, the jury were instructed in accordance with the views of counsel; not having inspected the finding, or re-cast the interest, I cannot say whether the interest charged was added, and interest on the general balance allowed. This will be found a very small affair."

The defendants appealed, and now moved this Court for a new trial, on the grounds :

1. Because it was objected that the witness, Mr. R. Q. Pinckney, Jr., was not competent to prove any portion of the account, except the original entries made by him as clerk to plaintiffs; and that Mr. Pelot, who made a portion of the entries, being (as witness proved) in Charleston, should have been produced to prove the original entries made by him; and the presiding Judge overruled the objection, and charged the jury that the account was sufficiently proved.

2. Because the presiding Judge charged that the charges for commissions for acceptances for goods purchased or furnished, and for indorsing the defendants' note, were to be allowed; when it was objected that they were not proper charges, unless a special agreement was proved, such not being the custom of Charleston; and it was also submitted that the charges of commissions, at least so far as the defendants' funds in hands of plaintiffs went, were not proper, but his Honor charged otherwise.

3. Because it was submitted that the charge of commissions on the balance was not a proper charge, inasmuch as commissions had been charged on each item in the account, and his Honor should so have charged.

4. Because interest was charged on each bill from the day of purchase; whereas, it was submitted that interest should only have been charged from the day of payment, the usual terms of said purchases being four and six months, and his Honor should have so charged.

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5. Because the jury allowed interest on the whole sum claimed as a balance; when, it is submitted, that such an allowance was improper—and that no interest should have been allowed, without proof of an express promise, and no such promise was proved.

6. Because there was no count in the declaration on a promise to pay interest, and such interest ought not to have been allowed.

7. Because one of the items of said account was a charge of a balance due July 1st, 1853, by James McGirt & Co., of \$273 78; and no evidence was adduced to sustain the correctness of said charge—nor was the letter referred to in said item, authorizing said charge, produced.

8. Because it was submitted that commissions were three times charged on the amount of \$1,299 87, brought down September 24th, 1853, and twice charged on the balance of the items of the account.

9. Because the item of \$31 41 interest last charged was improper, the interest having been before charged.

10. Because interest has been charged on interest.

11. Because the verdict was against the law and evidence.

Phillips, for appellant, cited Harp. 184.

Harlee, contra, cited 2 Bail. 407.

The opinion of the Court was delivered by

O'NEALL, J. In this case, without noticing the grounds *seriatim*, I will briefly notice what is regarded as material in the cause.

In a case standing on the inquiry docket, the default admits the cause of action, and the only inquiry is as to the quantum

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of damages. Any reasonable proof of the amount of the debt or demand is *prima facie* enough. I have never deemed it necessary in such a case to require proof of a merchant's account by the proofs of the original entries; proof that the account sued on and exhibited to the Court, is a true copy of the original entries, is enough to ascertain the quantum of damages. More than this was done on the present occasion. The defendants had the right to examine the account, object to the items as improperly charged, and even to call witnesses to show that they were charged too high, or that they ought not to have been charged at all.

On looking over the account it is objected that interest on advances or purchases by the plaintiffs as factors ought not to be allowed. Since *Sollee & Warley vs. Meugy*, 1 Bail. 620, such an objection cannot be sustained. So, too, there is nothing in the objection that interest is charged on the balance, and that thus interest is charged on interest;—for it appears that the credits allowed the defendants greatly exceeded the interest charged in the account before the balance was struck. The rule that payments are to be applied first in extinguishment of interest is uniform. Hence the balance of the account would be principal for payments and advances: and would properly bear interest.

But the charge for commissions on the balance cannot be allowed. The plaintiffs had been allowed in the account commissions for all the items of their account for which they were entitled to charge. They cannot be allowed commissions on the balance for the payment to themselves.

The motion for a new trial is granted unless the plaintiffs shall enter a remittitur on the record of \$88 75, the commissions improperly charged. If, however, this be done, then the motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

New trial nisi.

Brown vs. Stroud.

M. L. BROWN vs. JOHN J. STROUD.

Plaintiff in sum. pro., whether he have common law evidence to prove his demand or not, may, in order to prove it, require the defendant to answer interrogatories, and upon his failure to do so take a decree *pro confesso*.

BEFORE MUNRO, J., AT CHESTER, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

"This was a Summary Process to recover on a merchant's account.

"Interrogatories had been served on the defendant, requiring him to answer whether or no the account sued on was correct. Upon the defendant's refusal to answer, the plaintiff moved for a decree *pro confesso*, which the defendant resisted upon the ground, that the plaintiff had no right to resort to the mode of discovery in question, inasmuch as it was apparent from the very nature of the demand, that there existed in the plaintiff's own possession, abundant legal evidence by which it could be sustained, to wit : His book of original entries, and to the inspection of which entries the defendant insisted he had an unquestionable legal right.

"I sustained the defendant's objection."

The plaintiff appealed and now moved this Court to reverse the decision of his Honor, and for a decree *pro confesso* against the defendant, on the ground :

Because the defendant being served with interrogatories to answer, and refusing so to do, the plaintiff was entitled to a decree *pro confesso* ; and his Honor erred in deciding that the defendant was not bound to answer, and in denying the motion for a decree upon his refusal.

McAlily, for appellant.

Melton, contra.

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The opinion of the Court was delivered by

O'NEALL, J. The practice now sought to be subverted in this case is as well settled as any in this State, and has been uniformly pursued since *Fulmore* and *Gamble vs. Cockfield*, 2 Bail. 446, decided June, 1831. If twenty-four years cannot settle a matter of Summary Process practice, I confess I do not know what will. The practice is supposed to be at war with the Act of 1769, which created the summary jurisdiction and which authorized the examination of the party on oath.—It provides “in which suit the plaintiff shall have the benefit of all matters, in the same manner as if the suit was commenced in the ordinary forms of Law or Equity.”

The 34th rule of Court simply directs, if the plaintiff “*shall desire to have the benefit of the defendant's oath, he shall,*” &c. The words of the rule certainly are broad enough to give the plaintiff the right to examine the defendant, touching any matter legally involved in the process; yet, as was decided in *Holly vs. Thurston*, Rice, 282, he could not have such discovery until a plea which bars both discovery and relief was decided.

The 34th rule framed under the Act of 1769, supposes, as in Equity, a party may have a discovery ancillary to his legal remedy, when he alleges he has no other means of proving his demand. Hence when he desires the benefit of the defendant's oath, and examines him by interrogatories, he stands as a complainant in Equity; having sought and obtained, or failed to get, a discovery, the defendant's statement cannot be controverted. I know the rule once was, that to entitle a party to a discovery, it must appear that the party had no legal common law evidence in his power. In the case of *Wallace & Wilbourn vs. Norvell*, 1 Bail. 125, it was ruled, that inasmuch as a witness had been introduced proving the very fact to which the defendant desired to examine the plaintiffs, the discovery could not and would not be required. That decision was, I doubt not, right, but for a different reason. The party

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had given evidence of the fact, and therefore he could not, after relying on his common law right and means, resort to Equity.

In that case, *Walker vs. Mathaney*, Harp. 187, was not alluded to: it was probably overlooked. It allowed the defendant to be examined, touching the execution of a note to which a mark was made, and also whether an account was just. That was followed by *Roche and Chaplin*, 1 Bail. 419, which recognized *Walker vs. Mathaney*, and allowed the examination under interrogatories as to an account contracted by the defendant's ward with a tailor, and the defendant's promise to pay it.

In 1831, in the case of *Fulmare and Gamble*, 2 Bail. 446, in just such a case as this, where the presiding Judge had decreed *pro confesso* upon a legal demand, and of which, for anything which appeared, there might have been common law evidence, in consequence of the defendant's failure to answer interrogatories, and his decision was sought on that ground to be set aside, the Court speaking by myself said: "The presiding Judge was correct in decreeing for the plaintiff upon the defendant's failure to answer the interrogatories. This is the settled practice in the Summary Process jurisdiction; *Walker vs. Mathaney*, Harp. 187, another rule in this respect has never been changed." The case of *Wallace and Wilbourn vs. Norvell* was not then reported, and the more recent case of *Roche vs. Chaplin* had conformed to *Walker vs. Mathaney*.—As I have already said the practice since 1831, has conformed to the rule thus settled.

The motion to reverse the decision below is granted.

WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

WITHERS, J. For the sake of an established rule I concur.

Motion granted.

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THE STATE vs. J. A. L. THOMAS.

A judge is not bound to order a continuance on the affidavit and other requisites required by the 28d Rule. It is a matter within his discretion.

In cases of misdemeanor defendant is not entitled to have his witnesses bound over.

Where judgment is arrested a new indictment may be given out on the same warrant.

A prosecution for trading with a slave is not barred as to the imprisonment after six months.

The Court may permit evidence to be given after argument commenced.

BEFORE MUNRO, J., AT UNION, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

“ In this case, the charge against the defendant was for trading with a slave belonging to a Mr. Thomas, on the night of the 3d of August, 1853. The proof left no doubt as to the defendant's guilt.

“ On the defendant's 1st ground, I did not think the cause shown for a continuance was sufficient, therefore, I ruled the defendant to trial, and notwithstanding the able constitutional argument of the defendant's counsel, I did not think that I possessed the power to order the defendant's witnesses bound over in a case of misdemeanor. In reference to the 3d ground, I did permit the original warrant to be given in evidence, as I did not consider that it was at all affected by the arrest of the judgment in the former proceeding against the defendant (see *State vs. Thomas*, 7 Rich. 481); but whether the warrant shared the fate of the indictment in that case or not, I thought it clear that it could not have the effect of barring the prosecution so far as the imprisonment was concerned, whatever effect it might have as to the fine. As to the 5th ground,

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it is true I did permit the warrant to be given in evidence on the trial after the testimony had closed, and just as the counsel had commenced his argument, as it was apparent that the omission to introduce it at an earlier stage of the case arose from a mere inadvertence on the part of the solicitor."

The defendant appealed, and now moved for a new trial on the grounds :

1. Because the case should have been continued, as the defendant made an affidavit, bringing himself perfectly within the rule of court, and also moved the Court for an order to have the witness bound over, and his Honor had not the power by law to order the cases on, as it is most respectfully submitted, that his Honor then had no discretionary power left by which he could rule the defendant to trial, as he had used all due diligence.

2. Because the defendant's motion to bind over his witnesses should have been granted.

3. Because his Honor erred in permitting a warrant to be given in evidence which had been taken out against the defendant on the 29th August, 1853, on which an indictment had been given out against the defendant and the petit jury had rendered a verdict on the said indictment, in which case the judgment was arrested, which put an end to the legal existence of that warrant for any purpose whatsoever, and entitled the defendant to an acquittal from that indictment and the warrant on which it was predicated, and so his Honor should have ruled, but his Honor held and ruled the reverse.

4. Because the defendant's plea of the Statute of Limitations should have been sustained by the Court, as according to the constitution and laws of this State, (8 Stat. 701,) the prosecution was wholly barred, both as to the fine and imprisonment, and so his Honor should have ruled.

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5. Because there was a variance between the allegations in the indictment and the evidence, and the Court permitted the State to give evidence after the argument had been commenced.

6. Because the verdict is contrary to law and evidence.

Thomson, for appellant.

Dawkins, solicitor, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case for trading with a slave, I will as briefly as possible notice the grounds for a new trial.

1st. It is a mistake to suppose that at the first term, a Judge is bound to order a continuance on the affidavit and other requisites required 'by the twenty-third rule. Without these the case will not be continued: but it may be, notwithstanding these requisites are complied with, that there is reason to believe that delay, not justice, is the object of the party: in such circumstances the duty to order a case on is plain. But this case was not at the first term. The bill was found and traversed at a previous term. This was therefore the second term, and the case fell under the twenty-fifth rule, which was not complied with.

It is however better to say in this case, as Judge JOHNSON said in *Hunter vs. Glenn*, 1 Bail. 544, in the year 1830, and which, in substance, has been repeated in every case since. "The often repeated determination of this Court not to interfere with the discretion of the presiding Judge as to the trial or postponement of a cause, ought to have exempted it from further applications for a new trial on that ground. All that I find it necessary I should say is, *that we shall adhere to it.*"

2d. The Act of 1839, 11 Stat. 15, § 8, which declares that
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“the accused shall *in felonies, and in no other case*, have the like process,” a warrant to compel the witness to enter into recognizance to appear and testify, is certainly sufficient. *Ita lex scripta est* is the language of the learned counsel often employed before us: and in the same terms we must answer his ground. The 6th article of the amendments of the constitution of the United States, (1 Stat. 181,) has no application to this case. This is a case in a State Court. That article relates altogether to trials in the Courts of the United States. Whether *there* a witness may, in a misdemeanor, under the words “compulsory process,” be compelled to enter into recognizance to appear and testify at the instance of the defendant, it is not necessary to determine.

3d. The defendant has contended that an arrest of judgment discharged the defendants from the warrant, and that the State must begin *de novo*. Such a proposition was startling, when made by a lawyer of forty year’s experience. For it was altogether at war with all my previous notions of criminal law. The authority mainly relied on was 2 Hale’s P. C. 394–5, which when examined shows that the learned counsel was mistaken. For in *Vaux’s* case, where he was acquitted by verdict, 4 Co. Rep. 44, *a*, and where the judgment was “*eat sine die*,” yet, inasmuch as the words were not “*eat inde quietus*,” it was held, inasmuch as the indictment was defective, he might be tried again, and accordingly he was so tried, convicted, and executed. That decision would not now be sustained, for the verdict of acquittal, notwithstanding the defects of the indictment, would be enough for the defendant’s protection.

Lord Hale, after commenting on and disapproving of *Vaux’s* case, at page 395, tells us what the judgment in arrest ought to be; it is, as he says, “special,” “*quod indictmentum ob insufficientum cassetur*,” “and *quod* the prisoner *eat inde ad præsens sine die*.” This merely defeats the indictment, and leaves every thing before it in full force.

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4th. The defendant's fourth ground might once have been a debateable matter : but after the many decisions in this State, it cannot be allowed to be questioned, that the bar of the Act of 1748, only extends to the pecuniary fine, and not to the imprisonment. In the case of the *State v. Fields*, 2 Bail. 554, it was held by the Circuit Judge (Evans) and by the appeal Judges, Johnson, O'Neill, and Harper, in affirmance of his decision, in 1831, that the word penalty in the Act of 1748, is used in the sense of a fine or forfeiture of money, and not as including imprisonment or any other corporal pain.

In the *State vs. Lemon*, 2 Hill, 628, note *a*, the defendant was convicted in the Spring of 1831, of the offence of trading with a slave, and Judge Earle held that notwithstanding the trading took place more than six months before the commencement of the prosecution, that yet as the punishment by law consisted of fine and imprisonment, the statute only barred the fine, and that judgment must be awarded against the prisoner for the imprisonment. This decision was affirmed by the Court of Appeals. The case of the *State vs. Free*, 2 Hill, 628, in 1835, was for the same offence, attended by the same circumstances, as to the time of trading ; the same judgment was given on the circuit by Butler, J., and his decision was affirmed by the Court of Appeals. In the case of the *State vs. Dent*, (in 1845,) 1 Rich. 469, who was convicted of gaming at a period more than six months before the commencement of the prosecution, the whole subject was reviewed by the late Judge Richardson, and he concluded, after a careful examination of the law, that the decisions in *Lemon's* and *Free's* cases were right in principle. After such an array of authority, and with which the people of the State have been satisfied for twenty-four years, it ought not to have been supposed that we would undertake to introduce another rule. *Stare decisis, here, is not only duty but wisdom.*

5th. The variance between the allegation of the indictment and the proof, is, in point of fact, none. The slave Jerry was

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the property of a man known oftener by the name of David Thomas than David A. Thomas. I suppose it alludes to the difference between the warrant given in evidence after the defendant's counsel had begun his argument, which alleges the selling of spirits to have been to a slave of David Thomas, Sr. But this was no variance; senior is a mere designation—it is no part of the name. That the Court may permit evidence to be given after argument has begun and progressed, cannot be denied. It is a matter of discretion, and is never used except to cure an accidental omission.

6th. This ground is disposed of by the consideration already given to the other grounds.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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PAUL SPIGENER *vs.* FREDERICK COONER.

Where a river changes its bed gradually and imperceptibly by washings from one bank and accretions to the other, the proprietor whose bank is increased is entitled to the addition.

But where a river changes its course from a known cause, as by freshets, one or more, or by a cut through which a new channel is formed, the proprietor's right to go to the centre of the old bed, if it can be ascertained, is not destroyed.

A very small trespass, such as cutting off a cotton-wood tree, is sufficient to sustain the action of trespass to try title.

BEFORE O'NEALL, J., AT RICHLAND, SPRING TERM, 1855.

The report of his Honor the presiding Judge, is as follows :

"The plaintiff and defendant are proprietors of land lying on each side of the Congaree River; the plaintiff's land is on the Richland side, the defendant's on the Orangeburg or St. Matthew's side. In the lapse of a good many years, a large portion of the plaintiff's land was wasted and carried over to the defendant's side of the river; in the memory of the witnesses, the river was in two streams, the smaller branch running through the land of the plaintiff, the larger stream or main body running nearer to the defendant's; in the course of years the smaller increased and was the largest; at the instance of the defendant the plaintiff consented to his cutting a ditch from the old to the new river through a point of the plaintiff's land, to preserve the defendant's dam; this was done and the whole river found its way through it, leaving the old channel of the former main stream dry, and between it and the present river, a few acres, called, in the 2d ground of appeal, Sand Bar and Mud Flat, for which this action of trespass to try title is brought. The trespass consisted in cutting off a cotton tree, which had been partially washed up from the plaintiff's bank,

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when the cut was made by consent, and in cutting out a raft in the same.

“The jury were instructed, that mere accretions to the soil of the defendant from the wasting of the land of the plaintiff could not be recovered, but if the river changed its course, and its former channel was plain and obvious, the plaintiff would be entitled to recover to the centre of the old channel. The proof of the trespass was slight, but the cutting the cotton tree, which belonged to the plaintiff, might in an action of trespass to try title, when the gist was the title, not the trespass, be sufficient. The jury found for the plaintiff with five dollars damages. The plat was marked by myself with letters, intended to designate the middle of the channel, and which I think do so designate. The verdict corresponds with such marks.

The defendant appealed on the grounds :

1. Because his Honor charged the jury that if they could identify the old channel of the river, they were bound to find for the plaintiff; whereas, it is respectfully submitted, that the true question was, whether the river had changed its channel sensibly and suddenly, or gradually and insensibly; and the jury ought to have been told that if the change had been gradual and insensible, the identification of the old channel was totally immaterial.

2. Because the proof was clear that the river had gradually and insensibly, (not sensibly and suddenly,) changed its channel by laterally washing away the land claimed by the plaintiff, and with respect to the land which the river had by changing its channel left derelict (viz., the Sand Bar and Mud Flat), the right to the soil *usque ad filum medium aque* belonged to the defendant, who was the adjacent proprietor—the principle of law being, that if a river deprive a man of his ground by gradually and insensibly making a channel and thus

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gaining on one side, the original proprietorship is lost, unless the river subsequently return to its ancient channel, and unless the original land can be satisfactorily ascertained.

3. Because no trespass was proved—no trespass was pretended to have been committed on the Sand Bar and Mud Flat, left by the gradual change of the channel of the river; and the defendant committed no trespass in clearing out the cut off, which he had been allowed to open for valuable consideration—nor did the plaintiff, *bonâ fide*, commence his suit for such clearing out.

4. Because the defendant showed a title to the land in dispute by possession.

5. Because the verdict is manifestly erroneous in this, that it gives to the plaintiff the whole of the old channel of the river, to one-half of which (*usque ad filum medium aquæ*) the defendant was unquestionably entitled.

Bellinger, Gregg, for the appellant, cited, Ang. on Water Courses, 222; 1 U. S. Dig. 141; 1 Sup. U. S. Dig. 95; 4 Rich. 68; Ang. on Water Courses, 92, et seq.; 10 Peters, 717; 3 Barn. & Cres. 91.

Bauskett, contra, cited 3 Kent, 428.

The opinion of the Court was delivered by

O'NEALL. There is, I think, no doubt of the proposition, that in the case of mere alluvion, "where the change is so gradual as not to be perceived in any one moment of time, the proprietor, whose bank on the river is increased, is entitled to the addition." Ang. on Water Courses, chap. 2, § 58. Of this the defendant had the full benefit on the trial in the instruction to the jury, that "mere accretions to the soil of the defendant

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from the wasting of the land of the plaintiff could not be recovered;" and by it he held many acres of land which had been made by the washing of the river from the land of the plaintiff.

The case however turned, as to the recovery, upon another principle. Within the memory of the witnesses, and indeed until the cut made by Cooner, the main river ran in the old bed, marked as its centre by the letters C. D. That bed now remains, and along it the river in a freshet still flows. The land recovered is between it and the new river, and is, I suppose, a part of the original swamp land lying north of the old bed. After Cooner made the cut, the new river running through plaintiff's land forced its way through the cut, and left the old bed generally dry. This is what I suppose Mr. Angel calls "Reliction," (Angel on Water Courses, Chap. 2, § 57,) and which he described thus: "if the course of a river is suddenly changed, the relicted soil remains according to the former bounds." The defendant here contends that this change must be done *suddenly*: it is true the author says so, but it is manifest he does not mean to say it must be on one occasion, as when a river in one freshet changes its course; for he adds afterwards "*suddenly and sensibly*," and the reference is to Hargrave's Tracts, *De Jure Maris*, etc., which shows that it is not exactly applicable to the case in hand. His next reference is to *Lynch vs. Allen*, 3 & 4 Dev. & Bat. 62, which goes much further than this case. For there a line run and marked along the south bank of the river, and which gave to the plaintiff the whole river, and which river between 1820 and 1838 had changed its entire bed, and ran through the land of the plaintiff many acres north of the former bed, was held to entitle him to go to the former line designating the south bank. Judge Gaston said, in that case: "It does not follow, that because the river has deserted the bed, in which it flowed, when that deed" (the deed to the plaintiff in 1820,) "was executed, that the boundary of the land of the lessor of the

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plaintiff shifted with it. Admit that such would have been the consequence if the river had receded from its southern bank by small and almost imperceptible gradations, a point upon which *no opinion* is intended to be expressed or intimated, this consequence does not follow from changes by sudden and violent floods. Such is stated to have been the fact in this case. The change in the bed of the river was made by *freshets*, which we must understand to be excessive floods, producing violent and visible changes; and the instruction of the Judge is not to be treated as an abstract proposition, but as a practical instruction to aid the jury in applying the law to the case before them." No case can be more apposite than that case to the one in hand. For there the Judge below told the jury, if they could ascertain where the line defining the south bank was in 1820, they might go to that. Here the jury were told, "if the river changed its course, and its former channel was plain and obvious, the plaintiff would be entitled to recover to the centre of the old channel." Was not this instruction, as in *Lynch vs. Allen*, "a practical instruction to aid the jury in applying the law to the case before them?" For the jury had been previously told, that mere accretions, or as Blackstone says, "if a river by degrees gains upon the land of a person on one side and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy."

The change of the course of a river from a known cause, as by *freshets*, or by some human agency, such as *a cut*, through which a new channel is formed, either for the whole river or for a small part, which thereby becomes enlarged and thus diverts the main stream from its old bed, does not destroy the proprietor's right to go to the centre of the former main channel, if it remains visible, and is not covered up and destroyed by the alluvion. In this sense, and way, the instruction complained of was given. This is plainly right, and the verdict to the centre of the old channel is, as we think, *also plainly right*.

The trespass was in cutting off a cotton wood tree partially

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washed down in the *new cut*: its root still remained in the soil of the plaintiff, it was therefore his tree, and however small a trespass it may be, still it was enough to sustain an action of trespass to try title. I remember to have once heard a most eminent Judge, the late Judge Nott, say, that in such a case the mere blazing of a tree would be a trespass sufficient to maintain the action.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, and MUNRO, JJ., concurred.

GLOVER, J., was of counsel, and gave no opinion. ✓

Motion dismissed.

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WILLIAM LYON AND MARY A. NORWOOD *vs.* TILMAN A.
WALKER.

Testator bequeathed "to N. L. and the *lawful heirs of his body* one negro girl: the said N. L. dying *without lawful heirs of his body*, the said girl and her increase shall be returned and equally divided between my son W. L. and my daughter M. N.:"—*Held*, that the limitation to W. L. and M. N. was void for remoteness.^(a)

BEFORE O'NEALL, J., AT ABBEVILLE, FALL TERM, 1854.

THE report of his Honor, the presiding Judge, is as follows:

"This was an action of trover brought to recover the value of a negro woman slave, named Martha. The plaintiffs claimed under the following clause in the last will and testament of Elijah Lyon, deceased, viz: 'At the death of my wife, Phebe Lyon, I give and bequeath to my grand-daughter, Mary Ann N. Lyon, and the lawful heirs of her body, one negro woman, named Eliza; and to my grand-son, Nathaniel N. Lyon, and the lawful heirs of his body, one negro girl, named Martha. The said Mary Ann N. Lyon, or Nathaniel N. Lyon, dying without lawful heirs of their body, the said personal property and its increase shall be returned and equally divided between my son, William Lyon, and my daughter, Mary Norwood.'

"Nathaniel N. Lyon, to whom the woman Martha was bequeathed, died without having any 'heirs of his body' (descendants), and the plaintiffs claimed as entitled in remainder. I thought the limitation over was good, and that the plaintiffs were entitled. The conversion was proved. The plaintiffs had a verdict for the value of the slave."

(a) It must be understood that the testator died before the Act of 1853, concerning limitations, 12 Stat. 298.

Lyon and Norwood vs. Walker.

The defendant appealed, and now moved this Court for a new trial, on the ground:

Because it is respectfully submitted that his Honor erred in holding that the limitation over to the plaintiffs in the will of Elijah Lyon, deceased, was good.

McGowen, for appellant.

Thompson, contra.

The opinion of the Court was delivered by

WARDLAW, J. The clause of the will before us, which directly concerns this case, if divested of words concerning other persons and things which it contains, would stand thus—“I give to my grand-son, Nathaniel Lyon, and *the lawful heirs of his body*, one negro girl named Martha; the said Nathaniel Lyon dying *without lawful heirs of his body*, the said girl and *her increase* shall be returned and equally divided between my son, William Lyon, and my daughter, Mary Norwood.” The question is, whether the limitation to William Lyon and Mary Norwood is good as an executory bequest, or is too remote.

If this clause should be altered by substituting for what follows “increase,” these words, viz.: *shall go to my son William Lyon*, it would be difficult to select technical terms which would, more plainly than the clause thus altered, express a direct bequest of such interest in personal property, as would be a fee conditional in land, and of course a fee simple in personalty, and a limitation of such personal property upon the contingency of an indefinite failure of heritable issue. The intention of the testator to pass the property over, upon the happening of the contingency, would be plain, but the law would not permit the intention to prevail, and would vest the whole interest in the first taker.

That which would be made so plain, by the alteration sug-

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gested, must be applicable to the clause as it stands, unless a difference is made by the words which follow "increase." That difference is insisted upon; and to meet the force of the technical words which the testator has used, reliance is placed upon these matters. 1. The limitation was to persons in *esse*. 2. It was to the testator's children. 3. The words "*equally divided*." 4. The words "shall be returned and divided."

1 and 2. That the persons to whom a limitation over is made, are in *esse*, has often been held to be of no avail in a question of remoteness. In *Henry vs. Felder*, 2 McC. Ch. 343, Judge Colcock says, "that the case put in all the books to illustrate the rule, is a limitation over to one in *esse*." See also *Cox vs. Buck*, in the Court of Errors, 5 Rich. 604; *Beauclerk vs. Dormer*, 2 Atk. 314. The same cases, and many others cited in them, show that the circumstances of the limitation being to the testator's children, *nominatim*, or as a class, gives no aid in the attempt to show what must be shown before the limitation can be held good; that the testator clearly intended that the contingency, if it happened, should happen within the period prescribed by law. If the children in *esse* here took any interest, it was a transmissible interest, and the testator may then have intended (and probably did intend), that if his grandson's descendants should fail in the next, or any subsequent generation, so much of Martha and her increase as might then subsist, should be enjoyed by the representatives of his son and daughter. It was likely that the grandson would outlive the children, and that Martha would have increase.

3. "Equally to be divided," affects the manner of enjoyment which was contemplated, but indicates nothing as to the time when it was to commence. The mode of division, *per stirpes* or *per capita*, equally or unequally, does not touch the question concerning a restriction imposed upon the happening of the contingency. A limitation to several stands in the same predicament as a like limitation to one. *Shephard vs. Shephard*, 2

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Rich. Eq. 142; *Robinson vs. McDonald*, 2 Kelly's Geo. Rep. 120.

4. The main reliance in this case has been placed upon the words, "shall be returned and divided." These have been supposed to show in some way that a coming back to the executor, or to the remainderman, during a life in being, was contemplated. If in much more plain terms, the intervention of the personal representative of the testator, for the purpose of making division, was indicated, an executor of the executor, or an administrator *de bonis non*, might long after the time prescribed for limitations exercise the rights and powers of the executor; and if no vesting of the contingent interest, without the intervention of such representative, was intended, this action should have been in the name of the executor. Even plain terms, which would show a reference to the character or office of executor, and not to his person, would not then have the effect of expressing a restriction of time. The terms here used are however such as have never been considered effective. In *Guery vs. Vernon*, 1 N. & McC. 75, Judge Cheves considered *return* to be a synonyme for *go or pass*, but seems to have thought, that if any other meaning was to be put upon it, it implied a coming back to the succession provided by the limitation, after an indefinite failure. It may not, to all persons, as it does to me, suggest that the notion of distant future was in the mind of him who used it; but certainly it does not more than either of its synonymes abovementioned, indicate a limitation of time. The cases of *Brummet vs. Barber*, 2 Hill, 552, and *Cordes vs. Ardrian*, 1 Hill, 154, have been cited, because, in both cases, the word *return* was used, and the limitations were held good; but the first of these cases was decided upon the force of the word *children*, as distinguished from *issue*; and the second depended upon the words *other surviving children*. (See *Treville vs. Ellis*, Bail. Eq. 40; *Stevens vs. Patterson*, Bail. Eq. 46; *Massey vs. Hudson*, 2 Mer. 130.) The case of *Keily vs. Fowler*, 3 Brown's Par. Cases, 299, is, however, most pressed

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for the plaintiff. That case has often been commented on. (See Fearn. Con. Rem. 482; 2 Rop. on Leg. 1555; 1 Jarm. on Wills, 319—446; Lewis on Perpet. 357, and cases there cited; 1 T. R. 596; 4 Dess. Eq. 316.) The words "return back to my executors to be distributed," were used; but the marriage of a daughter without the consent of the executors was one of two contingencies, and there were various "*indicia* of intention furnished by the will, which were evidently unfavorable to the supposition that the testator had in his contemplation an indefinite expectancy." It is vain to look for such *indicia* in the will before us; indeed, if it was not enough to rely upon the absence of expressions to show that the testator has subjected the contingency to the required restriction, a reference to other clauses of this will might strengthen the legal conclusion, that he has undertaken to limit over, after an indefinite failure of the descendants of the first taker.

The limitation over is considered too remote.

Motion granted.

WITHERS, GLOVER, and MUNRO, JJ., concurred.

O'NEALL, J. I dissent. The limitation over is good.

Motion granted.

State vs. Steedman.

THE STATE *vs.* SAMUEL STEEDMAN.

An indictment charging, generally, that defendant "unlawfully did sell and retail spirituous liquors, that is to say, in quantities less than three gallons, he then and there not having any license or permit," &c., without specification of any person to whom the sale was made, or of any other identifying circumstance, is bad. (a)

BEFORE MUNRO, J., AT CHESTER, SPRING TERM, 1855.

This was an indictment for retailing. The defendant was convicted, and he now moved this Court in arrest of judgment.

Thomson, for appellant.

Dawkins, solicitor, contra.

The opinion of the Court was delivered by

WARDLAW, J. The indictment alleges that the defendant "on the first day of March, &c., at Chester, &c., unlawfully did sell and retail spirituous liquors, that is to say, in quantities less than three gallons, he then and there not having any license or permit from" &c.

Here is no specification of a person to whom the unlicensed sale was made or of any other identifying circumstance which might designate the particular act of which the defendant was accused. The time and place which are alleged, are not distinctive: for time not being of the essence of the offence, a day different from the day laid may be proved, and the place being

(a) In the *State v. Thomas*, at this term, the same point arose and was decided the same way.

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only the *venue* technically required, embraces the whole judicial district. In effect the accusation is general, that the defendant before the finding of the bill violated the license laws in Chester District. There is not even the *continuando* inserted in this indictment, which in cases for keeping a bawdy house, for being a common scold, or for other continuing nuisances, is usually introduced, and which serves to characterize those special offences that consist of an unlawful repetition of acts, and are excepted from the general rule which demands in an indictment a specific description of the act alleged to be criminal.

Formerly retailing without license was considered by some of the judges in this State, to be like keeping a tavern without license, and to require for its completion a succession of acts. (See 2 N. & McC. 37; Dud. 43; *The State v. McBride*, 4 McC. 332.) Under that view an indictment that the defendant from a day certain to a day certain, or on a day certain and divers other days, did retail certain spirituous liquors without license to divers persons, might be sufficiently definite: but the proof of a single act of retailing would not serve for conviction, unless it raised the presumption of other acts so many as to constitute the unlawful habit.

But it is now fully settled that the offence of retailing without license is made complete by a single act, and that a conviction for one act of retailing does not bar a prosecution for another act, when both have preceded the finding of a bill of indictment for either. (See *State v. Cassety*, 1 Rich. 90; *State v. Mooty*, 3 Hill, 187.) Under this view it is indispensable that the act, which is to be proved for the establishment of a defendant's guilt, should be in some way particularized in the indictment; so that it may appear to be the act, or one of the acts, which the grand jury presented,—that the defendant may know how to prepare for his defence—that the judgment of the Court may be guided by a verdict of conviction,—and that full effect in bar of other prosecutions may be given to an acquittal or conviction.

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It frequently occurs that out of the same transaction grow an indictment for trading with a slave, and another for retailing without license. In the former by specification of the slave dealt with, and of the article bought or sold, the act of unlawful trading is defined: and no reason can be seen for dispensing in the latter with all the allegations which might give exactness to the accusation. The case of the *State vs. Anderson*, 3 Rich., 175, shows that in an indictment for retailing without license, retailing to various third persons may be alleged in the same count, and that proof of retailing to either of them will be sufficient. A larger indulgence, which would permit proof of retailing to any and every body under a general allegation, seems not to be required for the proper enforcement of the law, and might be turned to purposes of oppression and injustice.

The motion in arrest of judgment is granted.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

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GIDEON EVANS vs. JOSHUA CORLEY.

A deed of conveyance described the land as containing so many acres, "being part of a tract of eleven thousand seven hundred and thirty acres granted to W. M.: situate," &c.; "bounded," &c.; "*as will more fully appear by reference to the annexed plat.*"—*Held*, that the conveyance embraced all the land described by the plat, although a portion of it was outside of the grant to W. M.

Against a mere trespasser without title or possession, plaintiff's possession will be held to have extended to the limits of his color of title.

BEFORE GLOVER, J., AT BARNWELL, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows:

"The action was trespass *quare clausum fregit*, and issue was joined on the plea of not guilty.

"The tract of land on which the trespass was alleged to have been committed, was granted to William Minor the 5th August, 1793. From the grantee the plaintiff traced title through N. Bush to himself and William S. German, jointly. The latter conveyed his interest to the plaintiff, with a plat annexed, on the 26th of February, 1831. A plat of the Minor tract of land, made by Buckhalter, in February, 1831, for the plaintiff and William S. German, was also offered in evidence. The plaintiff proved a possession by himself of the land claimed under the Minor grant ever since the 16th December, 1830, when he and German bought of N. Bush.

The defendant shewed neither title nor possession, but he insisted that the true location of the Minor grant would not embrace the land on which the trespass was committed. This was the opinion of the Circuit Judge; but Buckhalter's plat, under which plaintiff had had possession since 1831, did embrace it; and whatever doubt might exist as to the identity of

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the Minor tract of land, there was none respecting the extent of the plaintiff's claim by virtue of his possession since 1831. Under the instruction of the Circuit Judge the jury gave a verdict for the plaintiff."

The defendant appealed and now moved for a new trial, on the ground:

Because his Honor, the presiding Judge, charged the jury that the possession of the plaintiff under the re-survey plat of William Buckhalter, in 1831, of the land granted to William Minor, extended to the limits designated by the said plat, and was sufficient to sustain the plaintiff's action. Whereas, it is submitted that, inasmuch as the said plat upon its face purports to be a re-survey of the said land granted to William Minor, and refers to said grant, the possession of the said plaintiff should have been restricted to the true limits of said grant; and his Honor should so have charged the jury.

Owens, Hutson, for appellant.

Aldrich, Carroll, contra.

The opinion of the Court was delivered by

WARDLAW, J. This appeal in effect controverts the view which the Circuit Judge took of the extent of the plaintiff's claim under the deed from German. That deed professes to convey to the plaintiff, "all that tract and parcel of land containing five thousand seven hundred and fifty-one acres, more or less; being part of a tract of eleven thousand seven hundred and thirty acres, granted to *William Minor* in the year 1793; situate in the District aforesaid on Shaw's Creek and Edisto River; bounded on the west by part of the said tract, south on land said to be William Minor's, on the east on vacant land at the time of survey, on the north by land surveyed for James

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Johnson, and Shaw's Creek; *as will more fully appear by reference to the annexed plat;*" and the plat annexed is a copy of the plat (professedly of part of the Minor tract,) which a short time before had been made by Buckhalter for the plaintiff and German. The Circuit Judge held, that the parcel thus described was the land represented by the plat.

In considering the propriety of the instructions which were given, we must disregard the effect which Buckhalter's survey, made twenty-four years ago, might now have in determining the true location of the Minor grant, and must take it for granted, as the Circuit Judge did, that the true location of that would not embrace the place where the trespass was committed, and that the actual occupancy of the plaintiff has always been within the undoubted limits of that grant. We must, however, also take for granted that the Buckhalter plat does embrace the place of the trespass,—that there is no extrinsic evidence to oppose the extension of the plaintiff's claim to the whole parcel which is described by the deed from German, and that the defendant shewed neither title nor possession.

The plaintiff says that the deed from German is color of title in himself—that he has been in possession of part of the land thereby described, with a claim to the whole,—and that the description in the deed, by reference to the plat, embraces all the land represented by the plat, although a part of it may be outside of the Minor grant. The defendant insists that the terms of description confine the parcel described to the limits of the Minor grant, and that therefore the plaintiff has had no color of title to the place of trespass, and so has had no such possession of that place as will maintain this action even against a casual trespasser.

The question is then one merely of construction. In weighing arguments on the two sides, an equilibrium might be turned in favor of the plaintiff by the rule that a deed-poll shall be taken most strongly against him who makes it: but it would be much

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more satisfactory to find better grounds for a judgment in an exposition of the intention which the instrument expresses.

"That parcel containing," etc., is the thing to be conveyed, but by this description it cannot be known; "being part of a tract, etc., granted to William Minor, in 1793," leaves it still uncertain, for where the line of division shall be, what the part meant is,—northern, eastern, middle, or some other—has not been designated:—"Situate in, etc., bounded, etc." give no aid, for thousands of acres might be included in the parcel or excluded from it, and yet all of these terms be in either case satisfied:—"as will more fully appear by reference to the annexed plat," gives exact certainty, and moreover seems to express that every previous term of description will be made more plain by the plat referred to.

Whatever may be the true location of the Minor grant, German in effect says by his deed that he conveys a parcel exactly defined, and that that parcel is embraced by the Minor grant. If his warranty had been general, there can scarcely be a doubt that under it he would have been liable, if his grantee by title paramount had been evicted from land which is contained in the plat, but not in the grant.

The defendant does not suggest that the deed is void, for a reference to the plat, and that alone, prevents such a suggestion; but he insists that the description taken altogether, means *so much of the parcel represented by this plat as is within the Minor grant*. Under the rule that the first certainty in a description shall prevail over repugnant demonstration subsequently made, he would cut off from the greater parcel shewn certainly by the plat all that is not embraced by the terms which refer to the grant. Certain lines of the grant having been admitted for argument's sake, they would, when laid down on the plat, cut off a portion from the certain parcel which the plat has established: but without reference to the plat there could be no certainty as to any parcel; and a strict

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application of the rule concerning a first certainty would not serve the defendant. Apart from that, however, it may be well maintained that when different terms of a description are incongruous, the general intention discoverable, rather than any rigid adherence to the order in which the terms happen to be introduced, determines what was meant. A conveyance of *the particular parcel represented by this plat, which N. Bush conveyed to me*, would embrace the parcel represented, although N. Bush had conveyed none, or only part of it; for there would be a certainty with a false demonstration. (Shep. Touch. 247.) The same might of course be said if the parcel was described as *one represented by this plat, which was granted to W. Minor*. And if a description should be *that parcel granted to W. Minor which is represented by this plat*, although there would be certainty in the first terms of description which refer to the grant, and the subsequent demonstration should be inconsistent therewith, the whole taken together might well be understood to mean that the grantor avers the coincidence of the two circumstances of description, and if they disagree is bound by that which contains the larger quantity. This is more plainly the meaning, where the larger circumstance is, of itself, without reference or inquiry, so much more exact and precise than the other, as a plat is more exact and precise than any description by metes, bounds, or title deeds can be. But when, as in the case before us, the first circumstance is of itself incapable of being rendered precise, there can be no propriety in allowing it to restrain the absolute certainty which independent of it, is given by the other circumstance of description.

This case, it will be observed, is not one of general terms restricted by subsequent specification, nor one where inconsistent terms of description designate distinct things when one only is meant; but it is a case where a circumstance of description is first introduced which would confine the parcel within certain limits, but leave it uncertain within those limits, and subsequently another circumstance is introduced which gives

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definiteness, but extends the parcel beyond the limits of the first circumstance.

The second contains the first and something more. No words are used which can imply that only a part of the thing at last defined is meant. From the whole deed the intention must be collected, and if that intention required a transposition of words, such transposition would be made. A plat is like a picture of the land; and the certainty which it exhibits should be no more unsettled by an erroneous reference to the title, than by mistaken boundaries specified in the deed but corrected in the plat annexed.

Some diversity of opinion in this case has been produced by the case of *Gibson ads. Chappell*, Harp. 28; but to a majority of the Court it appears that that case does not conflict with this decision. That was an action of trespass to try titles. The plaintiff shewed a grant to himself, embracing the *locus in quo*. The defendant shewed no other grant which embraced the *locus*; but relied on a grant of adjoining land to Ackery, a conveyance to himself from one Curry of part of the land granted to Ackery, which was so described as to embrace the *locus*, and his own possession within the Ackery grant for twenty-five years—whence he endeavored to raise the presumption of a grant for all contained in the Curry deed. It was not a question of construction, for there was no doubt that the Curry deed included the *locus*; but it was a question concerning the extent of an implied possession, and that was resolved by the familiar principle that no length of possession outside of a tract will give title against the owner of the tract. The title which had been in the State was vested in the plaintiff, and the title of the State in the *locus* could not have been affected by the defendant's lawful occupancy of his own adjoining land. So in the case before us, if the defendant had shewn a title in himself to the land outside of the Minor grant, the possession of the plaintiff within that grant could not have been extended by any color of title to embrace the land of the defendant who

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could not have complained of that possession. "But accompanied by evidence of a claim to a tract, possession outside of the tract is sufficient to maintain trespass against any one who has not the right which title gives." "When possession is claimed to extend to more than is visibly occupied, the difficulty is always to ascertain how far it does extend. Beyond the limits of its extent, there is no possession, constructive or actual; within them, all is actual. The extent depends not merely on the evidence of bounds, under which possession with a claim is held, but upon the character of a conflicting claim, and the possession which attends it; and sometimes it will be considered more or less according to the person with whom the occupant is litigating." *McColman vs. Wilkes*, 3 Strob. 474, 477-8.

Against a mere trespasser without title, Gibson's possession would in the case cited, have been held to be co-extensive with the color of title shewn by the Curry deed; and against the defendant here, who has shewn neither title nor possession, the possession of the plaintiff in the absence of all evidence to contradict the presumption of claim according to his color of title, must be held to extend to all that German appears by a just construction of his deed, to have undertaken to convey to the plaintiff.

The motion is dismissed.

O'NEALL, WHITNER, and GLOVER, JJ., concurred.

Motion dismissed.

State vs. Parish.

THE STATE vs. THEODORE PARISH.

The defendant, with three others, was convicted of an affray for beating in public one M. During the affray the prosecutrix went up to protect M., who was her son, and defendant struck her:—*Held*, that the conviction for the affray was no bar to this indictment for an assault and battery on the prosecutrix.

BEFORE MUNRO, J., AT YORK, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

“This was an indictment against the defendant for an assault and battery committed on the person of the prosecutrix, Nancy M’Lean.

“At the preceding term of the Court, the defendant, together with three others named Ashcrafts, had been convicted of an affray, for beating a son of the prosecutrix in one of the streets of Yorkville.

“In the affray in question, the prosecutrix had no participation whatever; her only motive in remaining at the scene of action, was to endeavor to rescue her son, who was much intoxicated, from the violence of his assailants. It was while engaged in this task, and with her son’s head in her bosom, endeavoring to protect it from the blows of the Ashcrafts, that defendant came up and violently seized her by the arm, and struck her two blows upon the head.

“It was argued for the defendant that the battery in question was not a separate and distinct offence, but was merely part and parcel of the original affray, and that the former conviction was a bar to the present prosecution.

“I ruled otherwise.”

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The defendant appealed on the ground :

Because his Honor held that the former conviction of this defendant for an affray in the case of the State against this defendant and others, at Fall Term, 1854, could not be pleaded in bar to this indictment ; whereas it is submitted that the testimony adduced on the trial of this case, if it had been adduced in the former trial, would have been sufficient to have convicted the defendant of an affray in the former case, and that therefore he was entitled to plead the former conviction in bar.

Clawson and Jackson, for appellant, cited 1 Russ. 882 ; 1 Ch. Cr. L. 455.

Dawkins, Solicitor, contra.

The opinion of the Court was delivered by

WHITNER, J. The objection taken in this case rests upon the assumption of a former conviction. To constitute this a good defence the offence must be identical or necessarily included the one within the other.

The defendant with others had been convicted of an affray, all the combatants being charged in the general count in the indictment. Special counts charging each with assault and battery on the others were added.

The present indictment charges an assault and battery to have been committed on a female, whose name does not appear in the former proceeding, and who was in no way mixed up with the transaction than in an endeavor to rescue her son from the violence of others.

An affray is the fighting of two or more persons in some public place to the terror of the people.

In the former indictment there was no allegation of an assault and battery on this prosecutrix, the fact being proved would not have been pertinent to any issue then involved, and

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would not have supported, or in any way induced the conviction.

Subjected to such test it is manifest that the former conviction was no bar to the present prosecution, and the motion for a new trial is dismissed.

, O'NEALL, WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1855.

JOHNSON HAGOOD *vs.* JOHN H. HARLEY.

In debt on bond, a verdict for defendant on the ground that the bond had not been accepted by the obligee, set aside as without evidence to sustain it.

An instrument cannot be an escrow if delivered to the party himself—the delivery must be to a stranger.

BEFORE GLOVER, J., AT BARNWELL, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows :

“There were three cases entitled as this is, which were heard together. They were actions of debt on three several bonds, dated the 1st of January, 1842, each in the penalty of four thousand dollars. William J. Harley, who had been appointed by the order of the Court of Equity the guardian of Capers, Meldrid and Emily Dewit, and the defendant, executed three bonds with the usual condition of guardianship bonds.

“A bill was exhibited in the Court of Equity by his wards against William J. Harley as their guardian, and the defendant as his surety, praying an account, and by a decretal order, dated February Term, 1854, William J. Harley was required to pay to Capers one thousand six hundred and fifty-three dollars and five cents, and to Meldrid and Emily, each, one thousand six hundred and eighty-one dollars and forty-six cents, with interest from the 15th February, 1854. The Chancellor presiding at February Term, 1854, ordered that actions should be instituted on these several bonds, each of which had three seals attached, but they were signed only by William J. Harley and the defendant. The grounds of appeal suggest the enquiry, whether the Commissioner accepted these bonds in obedience to the order appointing William J. Harley guardian, or were they delivered ?

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“The fact of delivery was submitted to the jury, and depended on the evidence of A. P. Aldrich, Esq., the late Commissioner in Equity.

“His habit was to take two sureties and to deliver letters of guardianship when the bonds were executed. The letters directed to William J. Harley, dated 1st January, 1842, are now in the Commissioner’s office, and as he did not deliver them, he supposes that he did not receive or approve the bonds. He thinks that he stated to William J. Harley, but not to defendant, that he would require two sureties. While he acted as Commissioner, he took but one surety in cases of Dr. Ayer and Mrs. Crawley. In 1842, William J. Harley was regarded to be in very affluent circumstances, and the bond then was perfectly good. He received returns from William J. Harley, as guardian, after his appointment, for several years, and he reported him to the Court of Equity as an insolvent guardian in 1850. These bonds were recorded by his clerk, who was directed to record all papers in a certain desk. On the letters of guardianship ‘fees due’ were indorsed. James Aldrich, Esq., was a witness to the execution of the bonds and drew two of them; but he had no recollection of the circumstances attending the execution, nor of any conditions.

“The attention of the jury was called to the circumstances that these bonds had been found in the Chancery and recorded; that the words ‘fees due’ were indorsed on the letters of guardianship; that William J. Harley made returns to A. P. Aldrich, the Commissioner, to whom the bonds were drawn, and that he was reported to the court as an insolvent guardian by him; that a decree *pro confesso* was ordered against William J. Harley on the bill exhibited against him by his wards, as their guardian, and that James Aldrich, who drew two of the bonds and witnessed the execution of all, recollected no conditions.

“The plaintiff had the benefit of the strong impression which this evidence made on the mind of the Circuit Judge; but

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whether the bonds were accepted by, or delivered to, the Commissioner in Equity, was a question proper for the decision of the jury, who found for the defendant in each case."

The plaintiff appealed, and now moved for a new trial on the grounds :

1. Because the Court of Equity having settled the questions of the fact of William J. Harley's guardianship and the amount due by him as guardian, the defendant by whose suretyship he procured the appointment is as much liable as the said William J. Harley himself.

2. Because there was no proof of any condition when the defendant signed the bond that he was not to be liable, except on a contingency not performed ; and if the Commissioner did tell W. J. Harley, (of which there is no proof,) that he must give another security, the defendant, J. H. Harley was in no way a party thereto, and there was no proof that he was even present.

3. Because had the Commissioner required W. J. Harley to give another "security"—intending not to accept his bond until he did so—the defendant was not affected thereby, it being (if it existed at all) a mere arrangement between William J. Harley and the Commissioner.

4. Because, if the Commissioner did not approve the bonds at first (which he merely presumed he did not) he afterwards approved and accepted them by several distinct and unequivocal acts.

5. Because there being not the slightest proof that there was any arrangement or agreement between the Commissioner and John H. Harley or between W. J. and John H. Harley, it is submitted that his Honor should have charged the jury that the plaintiff was entitled as a matter of law to recover.

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Owens, for appellant, cited 1 McC. Ch. 107; 3 McC. 382.

Graham, Bellinger, contra, cited 11 Stat. 112, 358; 1 Mill, 456; 5 Rich. 171; 7 Rich. 217; 1 Cranch, 137.

The opinion of the Court was delivered by

WHITNER, J. A settled purpose on the part of this Court in no way to invade the legitimate province of the jury, has created the only hesitation in sending this case back. We are constrained to say, after a careful examination of the case made in this brief, that a verdict for the defendant was not authorized by any just view suggested to our minds. To have reached a conclusion favorable to the defence was matter of inference, and yet, conceding every fact established by way of defence, the just inferences, it is confidently submitted, lead directly to a different result.

The action is on bond, the execution of which is uncontroverted. Its enforcement is resisted because it is alleged not to have been accepted, or to have been delivered as an escrow. It is in the hands of the obligor, where it was incontrovertibly placed by the parties executing, and at the time.

I have no disposition to press at this point of the case the legal question suggested as to the controlling effect of such delivery. It has not been debated, and consequently not fully considered. An escrow is defined to be a deed delivered to a *third* person to be the deed of the party on a future condition. It is to be delivered to a stranger, mentioning the condition, and has relation to the first delivery. Jac. Law Dic. founded on 2 Roll. Ab. 25-6; Co. Lit. 31-36. In 4 Com. Dig. Tit. Fait, (deed) A. 5, if an obligation be made to A. and delivered to A. himself, as an escrow, to be his deed upon the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant. Again, 13 Vin. Ab. Faits (deeds), M. 8, a difference was taken between deliv-

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ery of a deed to a stranger or the party himself. It cannot be an escrow if delivered to the party himself.

In 6 Mod. 218, Holt, J. says, it is agreed by all that the deed cannot be an escrow to the party himself. In 2 Black. 807, and subsequent authorities, the same doctrines will be found.

The bonds were placed in the hands of the obligor, recorded in his office, the principal thereupon assumed the trust, and was received and treated henceforth as such. Assuredly that can be no hard measure of justice which shall require some proof of the fact affirmed by the defendant.

Neither the subscribing witness nor any other recollects any condition at the time of execution and delivery. It behooves the Court to look well to such a case, and at each step proceed with caution to attain a well-authorized conclusion. This, if a contract at all, is one of high import. Interests very peculiarly commended to the vigilance of judicial tribunals are involved. These should not be lightly jeopardied; certainly not by an unauthorized inference, capriciously interposed or hastily drawn. The officer to whom the Court in the first instance confided the due execution of this contract, and upon whom the law devolved very special responsibilities, is concerned. If these fail, sureties to a preceding trust may become implicated. It is true, these suggestions furnish any thing else than a consideration for placing responsibility on the wrong shoulders, yet they disclose the caution^e required, least in the sequel there may be a gross and manifest injury, for which none may be held to respond. The *prima facies* are against this defendant, and before these bonds are avoided the proof should be plenary.

A mere statement of the grounds on which the defence is rested, sufficiently discloses their inadequacy, without elaboration on my part. For instance, that the bonds when being prepared, had three seals, as though designed for three signatures—that it was the usual though not invariable habit of this officer to take two sureties—that he *may* have told the *princi-*
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pal, and *perhaps* did, that he would require two sureties, the fact, if even so, in no way brought home to this surety or the slightest proof that he in any way acted thereupon—that the letters of guardianship were still in the office, with an indorsement of “fees due,” most likely left for present safe keeping, it may have been from mere neglect, or as a memorandum temporarily that the fees were at the time unpaid.

In the further ground that the order was to enter into bond with sureties to be approved by the Commissioner, there is just as little. The objection is specious, the reply doubtless would necessarily savor of the same quality. However safer the practice to require two or more sureties, we know of no law requiring it, and the result would be strange to avoid a contract such as this, at the instance of the party contracting, without the least indication that he was thereby moved to the act.

The motion for a new trial is granted.

O'NEALL, WARDLAW, and GLOVER, JJ., concurred.

Motion granted.

Columbia, May, 1855.

SAMUEL MCKAY *vs.* R. W. DONALD.

When the surety of an administrator conceives himself in danger of being injured by his suretyship, he is entitled, under the Act of 1839, section 19, (11 Stat. 43,) to be relieved from future liability on his own motion and without proof of any danger.^(a)

BEFORE O'NEALL, J., AT SUMTER, SPRING TERM, 1855.

R. W. Donald was the administrator of John Donald, deceased, and Samuel McKay was one of the sureties on his administration bond. McKay filed a petition with the Ordinary, under section 19, of the Act of 1839, 11 Stat. 43, stating, that he conceived himself in danger of being injured by his suretyship. The Ordinary summoned the administrator before him, and, at the return of the summons, the surety contended that the Ordinary was bound under the Act to grant him relief upon his bare allegation that he conceived himself in danger of being injured. The Ordinary overruled this view, and held that the applicant must satisfy the Ordinary as to the truth of his allegation. Witnesses were examined. The Ordinary held, that there was no foundation for the allegation of the surety; but inasmuch as it appeared that the bond of the administrator might not be well secured, he required the administrator to give additional security. This was done.

The surety appealed from the Ordinary's decree, on the ground, that the Ordinary was bound to grant the petitioner McKay, relief, upon his bare allegation, that he conceived himself in danger of being injured by his suretyship.

His Honor, Judge O'Neill, sustained the appeal, and made the following order:

"On hearing the report of the Ordinary, on motion of Hayns-

(a) *De Lane's Case*, 2 Brev. 167—same point decided under Act of 1789.

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worth and Green, attorneys for petitioner, it is ordered, that the decree of the Ordinary be reversed, and that he do summon before him the administrator, R. W. Donald, and take the proper steps to discharge the petitioner from the administration bond."

R. W. Donald appealed from the decision of his Honor, Judge O'Neill, and now moved that the same be reversed, on the ground:

Because, it is respectfully submitted, that the Ordinary is not bound to revoke an administration on the mere filing of a petition by any of the sureties to the bond, who conceive themselves in danger of being injured by such suretyship. On the contrary, it is matter of judicial discretion on proof of maladministration.

Spain, Richardson, for appellant.

Haynsworth, Green, contra.

The opinion of the Court was delivered by

WHITNER, J. There is a single question presented in this case. Is the surety to an administrator entitled on his own motion to be relieved from future liability, when he conceives himself in danger of being injured by such suretyship? The true answer depends on a just construction of the statute law on the subject.

The Act of Assembly of 1839, concerning the office and duties of Ordinary, 11 Stat. 43, sec. 19, is as follows: "It shall be the duty of the Ordinary in whose office an administration bond is lodged, upon a petition filed by any of the sureties to the same, who conceive themselves in danger of being injured by such suretyship, to summon the administrator before him, and to make such order or decree for the relief of the petitioner as may not impair or affect the right of the parties interested in the estate."

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This section was not designed to make any change in the law then of force. The scheme of the Legislature on this subject is manifest, and has been throughout consistent. The Act of Assembly of 1789, (5 Stat. 111,) in its 24th section, makes provision for the *benefit* of the surety, declaring that if he shall *conceive* himself in danger, he may petition the Court for relief, and directs, with a slight difference from the Act of 1839, in the phraseology, that thereupon the Court *shall make* such order or decree *as shall be sufficient* to give *relief* to the petitioner. In the adjudications which followed, the courts were somewhat embarrassed as to the effect of the orders made thereon. They held that the Act contemplated clearly a discharge only from future and not from past liability. Then followed the Act of Assembly of 1839, and in this 19th section, the Legislature simply undertakes to set forth plainly the *duty* of the Ordinary in reference to the existing law. The right of the surety was in no way abridged, and the Ordinary was advertised that in granting his order for relief, he must have an eye to the rights of those interested in the estate.

It can scarcely be necessary to define the rules that prevail in the construction of statutes. Looking for the mind of the law-giver, the words themselves plainly declare the intention; they are employed in no controlling technical sense; they are precise and unambiguous, and therefore to be expounded in their natural and ordinary sense. He who *conceives* himself in danger, on filing his petition *shall be relieved* so far as the rights of those interested in the estate may permit. These rights are not to be impaired or affected,—saving them, the surety on filing his petition may claim relief as a right secured to him by law, and such relief the Ordinary is bound to order. Much evil is apprehended from such a construction as is now given, but with deference, I think, instead of leading to embarrassment in the administration of estates its operation will be wholesome. Confidence is invited by an easy and prompt relief if it is afterwards shaken, and I am as well satisfied that

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fideliſy in the performance of the truſt will be likewise better ſecured. He who pledges his property without the proſpect of gain, on the good conduct of another, yields much to the claims of frienſhip, or it may be to a ſort of obligation which the forms of ſociety impoſe, and its neceſſities beget. That ſhould be a very ſtern neceſſity alone that would require a continuance of ſuch bonds when confidence is impaired.

A different conſtruction of the Statute would, in my judgment, impoſe a new term to the contract.

The Act contemplates, it is urged, a *suit*, by requiring a *petition* and notice to the adminiſtrator as well as a *decree* by the Court. But this objection is fully met. Petitions are often required to this ſame officer in proceedings wherein, beyond diſpute, no *suit* is thereby inſtituted. As the ſurety muſt move, there is propriety in requiring a definite and uniform mode of proceeding, to conſtitute a part of the record. The adminiſtrator is to be directly affected by the relief, which muſt conſiſt of a revolution of adminiſtration, or providing other ſureties, and hence the notice. But if there is matter to be enquired into touching the queſtion in hand, what is the import of the *issue* raiſed, and by what decree is this investigation to be followed. The terms of the Act muſt answer. The allegation of the petition is, that the petitioner conceives himſelf in danger, and therefore aſks relief. The reply is, no juſt cauſe for apprehenſion, and the judge proceeds to enquire and decide, and *diſmiſſes* the petition, when the Act ſimply and plainly requires that thereupon he ſhall grant relief. The officer ſuperadds an enquiry, aſks for proof, and not being ſatisfied, reſuſes the application, though the law directs that on filing ſuch petition an order ſhall be made giving ſufficient relief.

The motion to reverse the order made by the Judge on Circuit is reſuſed.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion reſuſed.

Columbia, May, 1855.

HENRY GARRET *vs.* T. W. MALONE.

Plaintiff conveyed to defendant a tract of land as containing one hundred and ten acres, at eight dollars per acre; and it was verbally agreed between them, that the land should be surveyed, and if it turned out that it contained less than one hundred and ten acres plaintiff should refund, and if it contained more, defendant should pay for all over one hundred and ten acres at the rate of eight dollars per acre:—*Held*, that the agreement was not within the fourth section of the statute of frauds; and that plaintiff's promise was a sufficient consideration to support defendant's.

BEFORE MUNRO, J., AT UNION, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff, in his declaration, counted on the following parol agreement: "that the said defendant was indebted to the said plaintiff upon an agreement, that forasmuch as the said plaintiff had, before that time, to wit," &c., "sold and conveyed by deed, to the said defendant, a certain tract of land, by metes and bounds, for one hundred and ten acres, at and for the price of eight dollars per acre, the said defendant then and there undertook, and then and there promised to have the land accurately surveyed by one Giles N. Smith, and then and there faithfully promised that if he, the said plaintiff, would undertake and promise to pay him back, or refund to him, the said defendant, eight dollars per acre for each acre in the amount of land less than one hundred and ten acres, as should be ascertained by the said survey, that he, the said defendant, would undertake and assume to pay to the said plaintiff, the like sum of eight dollars per acre for each acre of land exceeding one hundred and ten acres, that should be ascertained by the said surveyor, in the said tract of land; and then and there the said plaintiff promised and undertook, &c.; in consideration

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whereof, the said defendant promised and undertook to perform the said agreement, and at the mutual instance and request of the said defendant, and the said plaintiff, the said Giles N. Smith did accurately survey and measure the said tract of land, when it appeared that the said tract contained one hundred and eighteen acres ; by reason whereof, and by virtue of the agreement, the said defendant became indebted to the said plaintiff, in the sum of," &c.

"As the evidence to sustain the foregoing agreement rested entirely in parol, its introduction was opposed by the defendant upon the ground that it was in direct conflict with the provision of the statute of frauds. I sustained the objection, upon which the plaintiff submitted to a non-suit with leave to move to set it aside."

The plaintiff appealed and now moved this Court to set aside the non-suit, on the grounds :

1. Because his Honor, the presiding Judge, decided that parol evidence was inadmissible to prove the agreement set out in the declaration, and that the statute of frauds was a bar to the plaintiff's action.

2. Because there was a good and sufficient consideration stated in the declaration, for the promise made by the defendant to the plaintiff.

Goudelock, for appellant.

Herndon, contra.

The opinion of the Court was delivered by

GLOVER, J. The 4th section of the statute of frauds provides, that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or here-

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ditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c., (2 Stat. 525).

There are contracts where the subject-matter of the agreement would seem to partake of the realty and which have been held not to be within this section of the statute. In the case of growing crops, it has been decided that only a sale of goods, as the produce of the soil, was contemplated, and that it did not relate to lands. (*Sainsbury vs. Matthews*, 4 Mee. and W. 343.) In the case of *Hoby vs. Roebuck and Palmer*, (7 Taunt. 157,) the landlord, after granting a lease in consideration that the tenant would pay an additional sum *per annum*, agreed to enlarge the demised premises, and it was held, that the original lease still existed; that the new contract was, therefore, no demise of the premises, and that it was merely a collateral agreement to pay so much more money, during the residue of the term, provided the lessor would make the necessary expenditure. And in a late case, (*Jeakes vs. White*, 14 Eng. Law and Equity, R. 350,) in consideration that the plaintiff would advance £2000 upon the security of a mortgage of land, the defendant agreed to pay all the expenses incurred by the plaintiff in investigating the defendant's title to mortgage the lands, the Court held, that such an agreement was not within the 4th section of the statute of frauds.

The contract of the defendant to pay, if there should be more than one hundred and ten acres, is not such an interest in or concerning lands as the statute contemplates. It is an agreement relating to the number of acres conveyed, and is a collateral undertaking and independent of the realty.

The plaintiff's promise to refund if, on a survey, there should be a deficiency, is a good consideration to support the defendant's promise to pay in the event of an excess. Mutual promises create reciprocal obligations which constitute a sufficient consideration to support such promises. They are not

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naked facts, but voluntary agreements resting on the mutuality of their obligations.

Howe vs. O'Malley (1 Murphy, N. C. R. 287,) is, in all its leading circumstances, this case, and was decided on the ground, that where the promises are mutual, one is a good consideration to support the other.

Motion granted.

O'NEALL, WARDLAW, WITHERS and WHITNER, JJ., concurred.

Motion granted.

Columbia, May, 1855.

WILEY, BANKS & Co. vs. W. H. SMITH.

The commissioner of special bail had allowed the applicant for the prison bound's Act to amend his schedule, but at the trial he failed to explain the matter, and the effect of the amendment, to the jury:—New trial for this reason granted—the verdict being against the applicant.

The commissioner was examined as a witness, and while testifying was stopped by one of the counsel and testified no further:—*Held*, that this was improper.

BEFORE D. HOKE, COMMISSIONER OF SPECIAL BAIL,
AT GREENVILLE, MARCH, 1855.

The report of the Commissioner is as follows :

“The note upon which the writ was founded under which the defendant was arrested, was offered in evidence.—W. B. Smith, defendant, sworn.—Says he gave his ledger, which he kept while merchandizing, to John Dill to pay him the amount said Dill was liable for as his security. I delivered the ledger to Dill after the writ was issued. Unable to tell how many accounts were on this ledger unsettled. Never kept an account of goods sold as to the total amount. Purchased goods from various merchants, amounting nearly to one thousand dollars. Sold but little for cash. Bought horses, and traded in that way. Sales on books not counted up. Can't tell the amount. Sold Elias Dill about nine hundred pounds of bacon at nine cents per pound. Sold him tobacco, one hundred and fifty pounds, at thirty-five cents; a small amount at twenty-two cents, and at twelve and a half cents per pound, also a remnant of goods, and a buggy, conditionally.

“*Cross-examined*.—After Dill, my security, had paid himself, the balance to be rendered to the plaintiffs, Wiley, Banks, & Co., to be applied to the notes they hold against me for the

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amount collected on my ledger which I had assigned to him. Sold goods on credit. Changed debts for horses.

*“John Campbell, sworn.—*Says, I arrested the defendant, W. B. Smith, as deputy sheriff. Made search for Smith repeatedly, and failed to arrest him. I eventually arrested him. After the defendant was arrested, Smith wished to have a secret talk with John Barnett, which I allowed. Smith did not wish to go to jail. Stated he had plenty of money to pay his way in jail, provided he was not well treated. Witness asked defendant how much money he had. Defendant answered, no great deal. Witness said to defendant, it has been reported you have eight hundred dollars, defendant replied it was not so. He had but little money. I saw defendant have fifteen dollars at Crotwell’s store when he paid for some whiskey. I had no conversation with defendant relative to the money he gave Barnett. I told defendant he would have to render all his money. Defendant said, certainly not, it would be hard to do so.

*“Cross-examined.—*I never saw defendant have more than fifteen dollars.

*“William Campbell, sworn.—*Says I saw defendant have money at Farmers. I do not know how much precisely at that time. I saw two or three ten dollar bills and a two dollar bill, and several bills in his bundle. I thought there might be two hundred dollars. Could not say how much.

*“Cross-examined.—*I only saw two or three ten dollar bills and a two dollar bill. I cannot say, with any certainty, how much money he had at the time I saw it. Never heard defendant say how much money he had. Saw the money the day he was arrested.

*“Godshaw, sworn.—*And says defendant came to Crotwell’s store, and bought one quart of whiskey. Gave me a five dollar bill to have changed to pay for the whiskey. I saw a roll of money in defendant’s hands. Looked like there might be one hundred dollars or fifty dollars.

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“Cross-examined.—Not certain how much money defendant had. He had a roll. Cannot swear he had fifty dollars. Looked like he had more. I saw ten dollars in the roll from which it was taken. The roll contained more money.

“John Barnett, sworn.—Defendant’s witness. Says Smith gave me his pocket-book when he was arrested by Campbell. Counted his money, some four weeks before he was arrested, which was eighty-four dollars the pocket-book contained. Counted the money after defendant was confined in jail, in the presence of McDaniel, jailor, and the amount in the pocket-book was seventy-two dollars.

“Cross-examined.—Talked with Smith while in the custody of Campbell. Gave me his pocket-book out of which he, defendant, took fifteen dollars. Wrote to me to bring his pocket-book down to the court-house, and not to open the pocket-book until it was opened in the presence of the sheriff; all the money I knew of the defendant having.

“D. Hoke, Commissioner of special bail, sworn, and says, defendant petitioned him praying for the benefit of the prison bounds on mesne process. Filed his schedule. Rule posted.

“After defendant filed his schedule, he received notice from plaintiff’s attorney that defendant’s schedule would be contested. Accordingly, a jury was summoned, and day assigned to try the validity of said schedule, suggestion filed by plaintiff’s attorney of false return, &c. After the suggestion was filed, defendant amended his schedule, but not until defendant gave the commissioner satisfactory reason for doing so, the commissioner being fully satisfied in his opinion that defendant had the right to amend where the plaintiff’s rights were not prejudiced, and consequently allowed the defendant the privilege to do so. Smith told commissioner he had rendered all the property and money he had.

“Cross-examined.—I was satisfied of the legality of allowing

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defendant to amend his schedule. Defendant gave reason why he did not render in his first schedule all his effects. I am willing to state the reasons defendant gave for not rendering all in his first schedule, (objected to by counsel for plaintiffs,) defendant, remarked that all monies remaining after his security, Dill, was indemnified, should be applied to plaintiffs' claim as he did not wish to relieve himself from the payment of the plaintiffs' claim against him."

The following verdict was returned by the jury :

We find the defendant, W. B. Smith, guilty of fraud in making a false return of his effects, and not guilty of undue preference in the payment of other creditors.

The defendant appealed on the grounds :

1. Because the jury erred in deciding that the Commissioner of Special Bail had no right to amend the applicant's schedule.

2. Because the jury founded their verdict on applicant's schedule, as filed by him on the 24th February, 1855, when they should have tried the issue in reference to his schedule as it stood when amended.

3. Because the verdict of the jury was not supported by the testimony.

Easley, for appellant.

Elford, contra.

The opinion of the Court was delivered by

MUNRO, J. It is by no means our intention to review the testimony adduced upon the trial of this case, with the view to discover whether or no the jury by their verdict have reached a conclusion that is sustained by the proof. This was a matter

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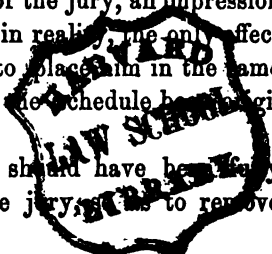
within their exclusive province, and one which we have no desire to invade.

There are several matters, however, disclosed by the report of the Commissioner of Special Bail—and entirely apart from the evidence—which we deem of sufficient importance to warrant us in sending the case back, in order that it may be again submitted to the consideration of another jury. Besides, as the charge against the defendant is one, which, in its consequences at least, is essentially penal, it is, therefore, due to the proper administration of justice, while at the same time it is of the last importance to the accused, that in the investigation of the case, he should have the full benefit of all the safe guards which the law has provided for the protection of those who are called upon to answer to a criminal accusation.

It appears from the commissioner's report, and the statements of counsel, that the defendant's schedule was filed on the 24th of Feb., 1855, and that on the 3d of March following, the commissioner, for reasons which to him were entirely satisfactory, permitted the defendant to amend it, by inserting therein, a buggy, and seventy dollars in money, in the hands of one Barnett.

Now, although there can be no more room to doubt the commissioner's authority to allow the defendant to amend his schedule, than there is reason to question the propriety of its exercise, still it is manifest, that the bare existence of a state of things requiring the exercise of such a power in order to perfect the schedule, was of itself sufficient—especially when unexplained,—to create in the minds of the jury, an impression prejudicial to the defendant, although in reality, the only effect of the amendment in question, was to place him in the same position he would have occupied, had the schedule been originally complete.

This was a matter which we think should have been fully explained by the commissioner to the jury, in order to remove



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from their minds any unfavorable influence which such a circumstance was so well calculated to produce.

There is also another matter in the report which we deem it proper to notice. It is therein stated, that while the commissioner was testifying as a witness in the case, he was stopped by one of the counsel, and thereupon ceased to testify any further. This the commissioner should not have allowed; for in the tribunal in which he was then presiding, his position was that of a judge, and where it was his exclusive province, as the only constituted organ of the law, to decide upon all questions of evidence that may have arisen during the progress of the trial.

The motion for a new trial is therefore granted.

O'NEALL, WARDLAW, WHITNER and GLOVER, JJ., concurred.

Motion granted.

Columbia, May, 1855.

W. B. BEAZLEY vs. CALVIN DUNN.

A. B. was sued as administrator before a magistrate, upon a debt of his intestate. Judgment was recovered. The execution was issued against A. B. in his individual capacity, styling him "administrator of A. Y.:"—*Held*, that the execution was null and void, and not merely irregular; and, therefore, did not justify a levy and sale by the constable, of A. B.'s property.

BEFORE GLOVER, J., AT BARNWELL, SPRING TERM, 1855.

The report of his Honor, the presiding Judge, is as follows:

"The action was trover to recover damages for the conversion of a mule, the property of plaintiff. As the administrator of Youngblood, he was summoned to appear before a magistrate in two cases at the suit of Heidtman and Willis, and judgments were entered against him in each case. Executions, in which the plaintiff was styled "administrator," were afterwards lodged by the magistrate with the defendant, a constable, who levied upon and sold the mule, the subject of this suit, in satisfaction of the executions.

"The presiding Judge instructed the jury, that the levy and sale of the mule under these executions were legal, and the verdict was for the defendant. If this instruction was error, a new trial should be granted. The second ground of appeal depends upon the evidence to prove a levy by the constable. This consisted of the lodging of the executions with him—his possession and advertisement of the mule—the plaintiff's demand of the mule; and defendant's refusal to deliver unless the debt and costs were paid, and that the advertisement and sale were at Williston, where the plaintiff lived, and who was near by at the sale and did not forbid it."

The plaintiff appealed, and now moved for a new trial on the grounds:

Beasley vs. Dunn.

1. Because his Honor, the presiding Judge, it is respectfully submitted, erred in charging the jury that the execution, under which the defendant, a constable, sold the mule in dispute, authorized a levy on plaintiff's property.

2. Because his Honor, it is submitted, erred in charging the jury, that the defendant did make a lawful levy on said mule.

Wilson, Graham, for appellant.

Owens, contra.

The opinion of the Court was delivered by

MUNRO, J. The only question involved in this case is, whether the execution, upon which the defendant relied as a legal justification, for having levied upon and sold the plaintiff's mule, which is the subject matter of this action, was issued in conformity with the judgment, upon which it professes to be founded.

It appears from the proceedings before the magistrate, that the plaintiff had been sued as the administrator of one Youngblood, upon a demand which existed against his intestate in his lifetime: Whereupon judgment was rendered against him in his representative capacity.

To enforce the payment of such a judgment the execution should have been directed against the goods and chattels of the intestate in the hands of the administrator; instead, however, of issuing it in the form suggested, the magistrate thought proper to issue it against the plaintiff in his individual capacity, and under which the levy and sale complained of were made.

It is true, the words "administrator of A. Youngblood," were superadded to the plaintiff's name—but that was nothing more than a *descriptio personæ*, and by no means changed the character of the process.

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Had the objection to the execution amounted to nothing more than a mere irregularity, as was urged in the argument, and into which the officer charged with its execution was not bound to examine, then it is clear the defendant's justification would have been undoubted. But while it is conceded that the law interposes its protection in favor of those charged with the execution of its process, where the defect complained of amounts to nothing beyond a mere informality, still if the process be void, and without authority of law, as was manifestly the case here, a different rule prevails. In such case, the law not only withholds its protection from the party claiming to act under it, but views with no little disfavor any attempt to convert its process into an instrument of wrong. See *Tobin vs. Addison*, (2 Strob. 3.)

As the execution under which the defendant acted was an absolute nullity, and therefore incapable of conferring upon him any authority to make levy and sale of the plaintiff's property, so neither can it afford him the slightest protection in an action by the plaintiff, seeking redress for the injury resulting from his illegal conduct.

The motion for a new trial is therefore granted.

O'NEALL, WITHERS, and WHITNER, JJ., concurred.

WARDLAW, J., absent.

Motion granted.



CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF ERRORS OF SOUTH CAROLINA,

Columbia, December Term, 1854.

ALL THE JUDGES AND CHANCELLORS PRESENT.

A. P. ALDRICH, COMM'R. *vs.* WILLIAM KIRKLAND.

A special injunction ordering security for the forthcoming of property in litigation, is within the powers of the Court of Equity, and may be granted by a Master or Commissioner, under the 8th section of the Act of 1840.

But an injunction to compel a party to find sureties to perform any other decree, such as the payment of money, is contrary to the rules and practice of the Court.

An injunction bond, conditioned that if the defendant shall cause certain property (specifying it) "to be forthcoming, to be subject to the final order of the Court," &c., and "shall abide by and perform such orders and decrees as the said Court shall make in the said cause," &c., construed, *ut res magis valeat quam pereat*, to require the defendant to abide by and perform such orders and decrees as the Court shall make, touching the property specified, which was to be forthcoming, &c.; and not to require the performance of any decree which the Court might make.

Failure to perform a mere money decree, *held* to be no breach of the bond.

BEFORE O'NEALL, J., AT BARNWELL. FALL TERM, 1853.

A full and clear statement of the facts of this case will be found in the dissenting opinion of his Honor, Chancellor Johnston, and in the report of his Honor, the presiding Judge, which is as follows :

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“This was an action of debt on a bond, conditioned, that Lewis Kirkland ‘shall, and do, well and truly cause certain property, to wit. : twenty head of cattle and two slaves, Nimrod and Comba, to be forthcoming, to be subject to the final order of the Court of Equity in a certain cause of Matthew J. Cave, trustee, vs. Lewis Kirkland and others, bill filed 5th May, 1849, and if the above bound Lewis shall abide by and perform such orders and decrees as the said Court shall make in the said cause, without fraud or further delay,’ &c. This bond was taken in pursuance of an order made by the commissioner, and pursues its terms, except that in the last clause it is broader than the order, which is, that he, the said Lewis Kirkland, shall abide by and perform ‘such orders and decrees as the Court may make in the premises.’

“The Court of Equity made no decree for the property ; it simply made a money decree based upon an account for money and property delivered to the said trustee long before the filing of the bill ; nothing is said about Comba. The value of Nimrod is charged, but that was admitted to have been erroneously done, inasmuch as the money, which bought him, had been previously charged in the account at February term, 1853. The value of Nimrod was struck from the account ; the cattle had been delivered and sold. Nimrod’s value was shown to be four hundred dollars ; he was killed by Lewis Kirkland, 1st October, 1849. The Court, February, ’51, ordered that the bond should be put in suit unless Lewis Kirkland fulfilled the orders by the 5th of March then ensuing. Lewis Kirkland confessed a judgment 7th May, 1849, for thirteen hundred dollars to the defendant, to indemnify him as surety in the bond under the *fi. fa.* The slave Comba was sold to, and bought by the defendant, for one hundred and five dollars. The defendant in the equity case, (Lewis Kirkland,) was shown to be insolvent. I thought, and so charged, that no breach of the bond was shown.

“The plaintiff chose to withdraw the case from the jury, and submit to a nonsuit.”

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“The plaintiff appealed and moved the Law Court of Appeals to set aside the nonsuit, on the ground, that, in the case made, the defendant was liable for the value of the two negroes, Nimrod and Comba, by reason that the said negroes were not forthcoming to meet the decretal order directing suit by a certain day. On the contrary Nimrod was killed by Lewis Kirkland, and the defendant appropriated Comba, under a confession of judgment, to secure himself.

After argument in the Law Court of Appeals, the case was ordered to this Court, where it was now heard.

Bellinger, for appellant, cited *Aldrich vs. Kirkland*, 6 Rich. 334, and contended : 1. That the validity neither of the interlocutory order, nor of the bond, could now be inquired into. The parties are concluded by the order. They could question it only on appeal. They did not appeal and they cannot now question the validity of the order or the bond taken under it ; *Meek vs. Richardson*, 4 Rich. Eq. 88. 2. That the order and bond were valid. 11 Stat. 110, § 7, 8 ; *Bryan vs. Roberts*, 2 Rich. Eq. This question concluded by decision on first appeal. *Attorney General vs. Jolly*, 2 Strob. Eq. 393. 3. That there has been a breach of the bond ; *Vose vs. Hannahan*, 6 Rich. 225 ; *Gadsden vs. Bank*, 5 Rich. 336 ; *Gray vs. Gidiere*, 7 Rich. 168.

Owens, contra. The decree is for money—not for the value of the negroes. If an order has been made for the forthcoming of the negroes, and the decree had been for their value, the bond might have been broken. But here the decree is not for the value, but for other matters.

The condition to perform the decree of the Court can only be broken by failing to surrender his body, or by failing to deliver specific property claimed and decreed to be delivered. It does not require that a money decree shall be paid. The

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Court cannot require that a party shall give bond and security to pay any decree. It can require bail, or bond, as in trover, for the production of specific chattels; 5 Gill & Johns. 463; 1 Smith, Ch. Pr. 484, note.

The opinion of the Court was delivered by

O'NEALL, J. When this case was before the Law Court of Appeals, on a former occasion, 6 Rich. 334, it would seem from the words of the Judge delivering the opinion, (p. 342,) that the Court inclined to construe the condition, as not imposing "an absolute liability to pay a money decree:" and the case went back to ascertain whether Lewis Kirkland had failed "to fulfil the conditions of the bond so as to implicate the defendant, his surety, until it appeared that he was in default, in that Nimrod and Comba were not forthcoming?"

This question came before me, and I thought, that inasmuch as the Court of Equity had rendered a mere money decree, and had made no order touching the slaves, that a breach of the bond was not shown: and, on expressing that opinion, the plaintiff asked for leave to submit to a non-suit, which was granted.

The appeal brought up no other question than the correctness of this ruling, and none other was needed to have been considered.

But it has been supposed by some of the Court that the liability of the defendant to the money decree was still, notwithstanding the former opinion, open for the plaintiff to rely upon, and the defendant (as he had a right to do to sustain the nonsuit,) has denied the power of the Commissioner to grant such an order as that made in this case, and has therefore strongly urged the unlawfulness of the bond.

This question raised by the defendant is first to be considered. The power of granting, by a Chancellor, special injunctions to restrain the party defendant from doing some act which would or

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might be irreparably injurious to the compliant, is undoubted. This was, as is said by Chancellor Harper in *Ramsay vs. Joyce*, McM. Eq. 252, irregularly exercised against the removal of property from this State, or to compel it to be forthcoming to abide the order of the Court, by requiring security to obey the provisions of such an injunction. In the case of *Ellis vs. Commander*, 1 Strob. Eq. 188, such writs and such practice had the sanction of the Court. In that case, Chancellor Dunkin says, "Many cases may be found in the books of reports in which the defendant has been required to give security to abide the order of injunction for the forthcoming of the property." After that case it may be considered as settled, that an injunction ordering security for the forthcoming of property in litigation is within the power of the Court of Equity, and may be granted by a Master or Commissioner under the 8th section of the Act of 1840, 11 Stat. 110, which says, that "Masters and Commissioners in Equity shall, in their respective districts, have the further power to grant injunctions, both special and common, conformably to the rules and practice of the Court." If, therefore, the order for the injunction is merely for the forthcoming of the property, Nimrod and Comba, to abide the decree of the Court in relation to them, it would be according to the practice of the Court as settled in *Ellis vs. Commander*. But if it be further to compel the party to find sureties to perform any other decree, such as the payment of money, it is beyond all doubt contrary to the rules and practice of the Court of Equity. No Chancellor in England or this country ever granted such an injunction or made such an order. If it were to receive the sanction of any Court, I know no greater usurpation than it would be. For it would be literally binding the defendant hand and foot for the sacrifice.

But I take it, the true construction of this order and of the bond, is, that the defendant shall abide by and perform such orders and decrees as the Court shall make touching the slaves Nimrod and Comba, who were to be forthcoming according to

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the words of the order and bond. It is true, the words used might extend to any order or decree made in the cause, but that would render the whole void as an illegal requisition and condition, and hence, therefore, the narrower construction is preferred; "*ut res magis valeat quam pereat.*"

Thus construing the bond, the inquiry arises, has there been any breach of the condition? It is clear there has been none. For the bill alleged that Nimrod and Comba were the acquisitions by the defendant from the trust funds, and therefore it claimed in one aspect that they should be delivered: and, in another, that the defendant account for the funds received.

In the report, the account is entirely for the alleged trust fund: the value of Nimrod, which was once included in the report, was afterwards struck out, inasmuch as the defendant had been already charged with the money which bought him. This report was confirmed, and the defendant ordered to pay the amount, \$660.19. There is not one word said touching Nimrod and Comba: they are not ordered to be forthcoming, or ordered to be delivered up. How can it be pretended there is any breach shown? It is plain there is none, unless it be in that part of the decree which directs, "unless Lewis Kirkland do, by the 5th March next, fulfil the conditions of the bond given by him in this cause, and dated the 7th May, 1849, the Commissioner do put the said bond in suit." This, as was said by one of the Chancellors at the hearing, is the order of the complainant's solicitor: it is no judgment of the Court of Equity on the matters in controversy; it is a mere license to the complainant to sue the bond at law.

The motion to set aside the nonsuit is dismissed.

DUNKIN, DARGAN, and WARDLAW, CC., and WHITNER, GLOVER, and MUNRO, JJ., concurred.

WARDLAW, J., dissenting. The defendant's seal to the bond

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is not denied. The condition, according to the plain meaning of its terms, has not been performed: for, although it may be said that the forthcoming of the negroes has never been required by any order of the Court of Equity, the money decree made by that Court has not been paid. The defence, then, is, that the condition of the bond, or the latter of two conditions, was unauthorized; in other words, that the bond was obtained by duress, and is not the act of the supposed obligors.

Common law bonds taken from parties and from persons who are not parties, in the Court of Equity, are, I suppose, necessary to the efficiency of the remedies there administered. When such bonds come under the consideration of a Court of law, some examination of the equity proceedings out of which they grow, and to which reference must be had in the assessment of damages, becomes indispensable. But it is greatly to be regretted, that a bond, whose validity as an obligation is disputable for reasons which assail the order under which it was taken, should be sent from equity to law; and, that when a bond is so sent, there should not be by the equity proceedings, a plain ascertainment of the amount of damages which the alleged breach has produced. As a Common Law Judge, I am incompetent to decide questions concerning the extent of equity jurisdiction or the propriety of equity practice. I feel embarrassed in groping my way through a mass of papers in a cause, which has been heard in a jurisdiction foreign to that of my own Court, and picking up a scrap here and a scrap there, in the effort to collect what has been decided pertinent to the condition of a familiar instrument that appears to be a plain obligation. When it is proposed that I should venture further and inquire whether what has been done was proper in itself, or properly done, I stop and examine the extent of my own powers. Here the Chancellors have been called to the assistance of the Law Judges in the Court of Errors; but skilled as they are in the learning pertaining to their own Court, they

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become in the consideration of a law appeal mere law Judges like my brethren and myself. The question for us all, in this case, is, what should the Circuit Judge have done? Ought he to have ordered a nonsuit?—and it must be decided by us all, as it should be decided, if each was a member of the law bench exclusively.

I have read, and suppose it is true, and properly so, that Chancery is jealous of the supervision of its process by any other tribunal: so much so that it will enjoin an action for a false imprisonment had under its attachment irregularly obtained. I have been taught that it moulds its practice at discretion to subserve the ends of justice. The interlocutory orders which shall be made for the preservation of property during a litigation, or for retaining the means of rendering a final decree efficient: the manner of obtaining an order for *ne exeat* or injunction: the mode of executing an order: the substitute which shall be accepted for a strict *ne exeat* bond; and the terms upon which an obligation, made under an order, may be discharged,—all I understand to be matters of equity practice. When I am told that the office of an injunction is to restrain the doing of an act, and not to compel the performance of one, if I see an order properly made which requires the performance of an act within the province of equity, and which is enforced by an effective process, I do not trust my judgment in searching equity precedents and determining the appropriate names of equity writs, but I leave those who would cavil at the practice, to apply to the Court whose authority is involved in the order, and from whose armory the process was selected. When the oppression and hardship of requiring from a defendant in equity, before the case against him has been heard, security to answer the decree, are urged upon me, I remember that such security is no more execution before judgment, than is bail in a common law Court, and is said to be often in equity practice taken in mitigation of the severe requirements of a strict *ne exeat*. If a bond containing such security is brought

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before me, and the sureties complain that no opportunity to render their principal in discharge of themselves has been afforded, I regard the order of a Chancellor that the bond shall be put in suit at law as decisive, according to the practice of equity, either that all proper opportunity has been afforded, or that the render in discharge was no part of the condition. I cannot say that under no circumstances could equity in the exercise of a sound discretion require a bond to answer a decree in all events; nor that the defendant in equity did not regard such a bond as a favor to himself granted in ease of more rigorous terms that might have been exacted; nor that the sureties to the bond did not enter into it with a full understanding of the obligation they were incurring. It is their act, and is subject only to the condition written in it, unless it was obtained by duress. There could have been no duress if it was taken under an order which was within the competence of the officer who made it.

The true point in this case is then contained in the question, whether the Commissioner in equity had power to make the order which he did make. This question requiring of one Court to judge of the acts done by an officer of another Court is in its nature a difficult and delicate one; and it becomes more so, when we consider the superintending control of a Chancellor over the Commissioner, which is contemplated by the Act of 1840, when it confers upon a Commissioner power to grant orders for *ne exeat*, and for injunctions common and special. It might well be expected that if the Commissioner exceeded his powers, application for discharge of an obligation improperly extorted would be made to a Chancellor at the next sitting, or at any rate when he comes after final decree to order a suit upon such obligation. But it may be answered, that the surety in the bond was not a party in equity, and that no subsequent ratification of a Commissioner's acts by a Chancellor, could give validity to an instrument which was not binding on the surety when it was executed. In considering the Commis-

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sioner's power, the recognition of an instrument taken under his order, which a subsequent order of a Chancellor made for enforcing the instrument contains, is however very influential to show the practice of the equity Court: and an order, which in effect partly restrains the removal of property, and partly requires a mitigated *ne exeat* bond, when thus impliedly approved by a Chancellor, ought, as it seems to me, to be held in a Court of law to be embraced by the terms used in the Act of 1840.

I come then to the conclusion, that the payment of the money decreed, was required by a condition of the bond which the defendant before us, as obligor, was bound to perform, and that by non-performance he has incurred the penalty of the bond, under which damages to the extent of the decree should be assessed.

There is, however, another view under which, even if the Commissioner had power only to order a bond for the forthcoming of specific property, and not for the performance of a decree, the plaintiff in this case might be entitled to recover. The decree of the Chancellor,—that the defendant in equity pay a certain sum of money, and that unless by a day certain he fulfil the conditions of the bond, the Commissioner put the bond in suit,—is in effect a decree that the specific property mentioned in the condition be forthcoming to answer the sum decreed; and imposes upon the surety, the defendant here at law, the burden of showing either the forthcoming or a sufficient excuse. The two conditions of the bond may be considered as alternative, or the latter may be considered void and the former broken. The result is the same in either view.

It is surely a most inequitable result that has been attained, where of two negroes claimed to be subject to the trust mentioned in the bill, the principal has disposed of one, and the surety has bought the other under his judgment taken to indemnify himself against this bond, and now the bond is

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inoperative, the principal is insolvent, and the surety goes without day.

WITHERS, J., dissenting. By adverting to the report of this cause in 6 Rich. 334, it will be seen that under a bill in equity, Lewis Kirkland was charged as being accountable to the complainant (Cave) for certain trust funds; that he had laid out some of those funds in a negro named Nimrod, taking title to himself, and some in another negro named Comba, taking title in the name of the trustee who was complainant. Among other things an injunction was asked to restrain Lewis Kirkland "from disposing of any of the trust property, or of the property purchased with the trust fund." A special injunction was ordered accordingly, and this defendant joined Lewis Kirkland in a bond, conditioned (*inter alia*) that Lewis Kirkland should cause the "two slaves, Nimrod and Comba, to be forthcoming to be subject to the final order of the Court of Equity," in the cause of Cave against him. An account was taken, but the value of Comba and Nimrod was not charged, *eo nomine*, against Lewis Kirkland; the account in the aggregate became the decree of the Court. Action on the bond was also ordered upon a condition which occurred, and it was brought against the defendant, who was surety, and before Judge Evans he was held responsible for the entire amount of the decree in equity, upon the footing of another condition of the bond, to wit: "that the said Lewis *shall abide by and perform such orders and decrees* as the said Court shall make in the said cause." Upon appeal, this Court held that the "decree in the cause," perceiving that it embraced the entire liability of Lewis Kirkland in all the matters in litigation, was not the proper measure of liability and of damages as against William Kirkland, the surety and the defendant in action. It was perceived that the circuit doctrine would make the surety absolutely responsible for the whole debt and liability of the party defendant in that

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jurisdiction, under cover of a special injunction, which looked only to the security of certain property to be forthcoming to answer the final order of the Court in the cause; that, in such circumstances, he would be in far worse condition than a surety on a bond under writ of *ne exeat*, "a proceeding of extreme rigor," (vide *Commissioner vs. Phillips*, 2 Hill, 634); for, in the latter case, the surety would have the right to surrender the principal in exoneration of himself; that there was most palpable difference in a covenant to abide by and perform any decree in a case, and one to cause certain specified property to be forthcoming for that purpose. This Court construed the latter to be the obligation upon the defendant.

In the opinion formerly delivered, various arguments and suggestions were offered to show the undue rigor of the rule adopted on the Circuit. They will not be made here the subjects of comment; but it does not seem to be intimated that no damages at law can be recovered against William Kirkland. If none can be recovered under the construction we give to the instrument, (mitigated towards the surety,) then it is of course a nonentity at law as against him. That is not supposed to be the opinion of the Court. The idea probably is, that some specific decree is required for the forthcoming of the specified property before the bond can be enforced. Why should that be held necessary? The covenant is, that it shall be produced to answer a decree in the *cause*, not one relating to the property itself.

The better opinion probably is, that the judgment of the Court of Equity should have been produced requiring the production of the negroes. Then is not that found, with sufficient distinctness, in the decretal order of 14th February, 1851, in the words following: "It is further ordered, that unless the said Lewis Kirkland do, by the fifth day of March next, fulfil the conditions of the bond given by him in this cause, and dated 7th May, 1849, the Commissioner do put the said bond in suit." When we remember that the bill had been taken *pro*

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confesso, and that the bill had charged the specified negroes to be the exponent of a part of the trust funds which were decreed against the principal in the bond, and when we advert to the condition of the bond, that they should be forthcoming to answer the decree, is it an unfair inference that the Court had decreed that they should be forthcoming on or before the day stated, and that a default in that behalf might, in the absence of satisfactory excuse, be a legal breach of the bond? That decretal order must be considered the act of the Chancellor, for one clause decrees that defendant in the bill do pay costs. It is not doubted that it is entirely competent for the Commissioner or a Chancellor to secure by writ, in nature of a special injunction, the forthcoming of specific property having the earmark of a trust fund upon it—and to decree that it shall be produced by a day certain. It does appear to me that this has been done in this case; and, therefore, that the plaintiff should have been allowed to go to the jury. I agree that, as I am now advised, a writ and a bond obliging the defendant to give security generally for a debt or liability, or to stand to, abide by, and perform the decree in a cause, cannot be brought under the head of a special injunction. I agree also, that while the Court of Equity must regulate, unquestioned by a co-ordinate jurisdiction, its rules of practice, yet, that when one of its bonds comes to a Court of Common Pleas, it must meet there the rules of the Common Law. But I think this bond contained one condition not offensive to the Common Law, and that such proceedings were had in equity in relation thereto, as to warrant its Commissioner to go to the jury and show its breach.

JOHNSTON, CH., dissenting. Lewis Kirkland, whose wife was entitled, for life, to an interest in certain settled property, had received from Cave, the trustee, in February, 1836, a negro woman Lucy, cattle of the value of one hundred and twenty dollars, and cash, capital of the trust, to the amount of four

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hundred dollars. The wife died in 1849, which determined her interest.

Cave thereupon filed his bill against Lewis Kirkland, the husband of the life tenant, for the restoration of the trust property, to answer the ulterior provisions of the settlement. In this bill it was alleged, that the husband had committed a devastavit by selling Lucy and applying the proceeds to his own use, and by vesting the four hundred dollars, which he had received in cash, in the purchase of two slaves, Nimrod and Comba, the titles to whom he took in his own name. The bill prayed that the stock of cattle be replaced, that the negro which had been sold be restored or her value accounted for, and that the negroes purchased with the trust funds be declared parcel of the trust estate, and delivered over as such, or their value, or the funds employed in the purchase, accounted for; and for general relief.

In the bill it was also alleged that the defendant was deeply embarrassed, and had exhibited evidence of an intention to remove himself with his property, including the slaves Nimrod and Comba, beyond the jurisdiction of the Court.

This bill was sworn to.

Under these circumstances, and before the cause was brought to a hearing, the commissioner of the Court, Mr. Aldrich, made an order "That the said Lewis Kirkland do give bond and good surety, in the penal sum of thirteen hundred dollars, conditioned for the forthcoming of the cattle and the slaves Nimrod and Comba, named in the bill, to be subject to the final order of the Court in the premises; and also, conditioned that he, the said Lewis Kirkland, shall abide by and perform such orders and decrees as the Court shall make in the premises." And on the 7th May, 1849, Lewis Kirkland gave to the commissioner his bond, with Wm. Kirkland as surety, conditioned that, "if the above named Lewis Kirkland, his heirs," &c., "shall truly cause certain property, to wit: twenty head of cattle and two slaves, named Nimrod and Comba, to be forthcoming, to be subject to

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the final order of the Court of Equity, in a certain cause of Matthew J. Cave, trustee, *vs.* Lewis Kirkland and others, filed the 5th May, 1849; and if the above bound Lewis shall abide by and perform such orders and decrees as the said Court shall make in the said cause, without fraud," &c.

The bill was subsequently taken *pro confesso*: and a reference was held by the commissioner: who reported:

"Lewis Kirkland, in account with Matt. J. Cave, trustee.

"1836, Feb. 11, To value of Negro Lucy delivered to Kirkland by trustee, and sold by Kirkland,	\$500 00
"1836, Feb. 11, To cash paid Kirkland by trustee,	100 00
"1836, Feb. 11, To cash paid Kirkland for land,	800 00
"1836, Feb. 11, To value of cattle,	120 00
	<hr/>
	\$1020 00

"1851, Feb. 20, Interest to date, on \$900 00, from 20th April, 1849, when Mrs. Kirkland died,	\$110 00
	<hr/>
	\$1130 00

"1836, Feb. 11. Deduct one-third, L. Kirkland's share,	\$376 66
"1836, Feb. 11. Deduct sale of cattle,	93 15
	<hr/>
	\$469 81

"Balance due M. J. Cave, trustee,	\$660 19"
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And on the 14th February, 1851, the following was passed as the final order in the cause:

"On hearing the report of the commissioner in this cause, it is,
"on motion of Bellinger & Hutson, complainant's solicitors,
"ordered that the same be confirmed and made the judgment
"of the Court:—and that the defendant, Lewis Kirkland, do
"pay to the commissioner, (to be by him invested in good bonds

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“and personal securities,) the amount reported to be due by
“the said Lewis Kirkland: and that the said Lewis Kirkland
“do pay the costs of this suit. It is further ordered, that
“unless the said Lewis Kirkland do, by the 5th day of March
“next, fulfil the conditions of the bond given by him in this
“cause, dated the 7th May, 1849, the commissioner do put the
“said bond in suit. Feb. 14, 1851.

“BENJAMIN F. DUNKIN.”

The bond was put in suit accordingly, against Wm. Kirkland, the surety. On the trial, as I learn from the judge's report, it was shown that Nimrod, shown to be worth four hundred dollars, was killed by Lewis Kirkland, the defendant in equity, on the 1st of October, 1849, after the bill was filed against him: and that pending the suit in equity, to wit, on the 7th of May, 1849, the same day on which the bond was given, Lewis Kirkland confessed a judgment to Wm. Kirkland, to indemnify him as surety on the bond: under which the slave Comba was subsequently purchased by Wm. Kirkland at the price of one hundred and five dollars. And it further appeared that Lewis Kirkland was insolvent.

The judge ruled that there was no breach of the bond; and nonsuited the plaintiff. An appeal was taken from that decision: and from the Law Court of Appeals the appeal has been removed to this Court for adjudication.

Whether there was any decree for the production of the slaves, Nimrod and Comba, or not, there was certainly a decree for the sum of six hundred and sixty dollars and nineteen cents; and the terms of the bond being (among others,) that “the above bound Lewis shall abide by and perform such orders and decrees as the said Court shall make in the said cause,”—the non-payment of this money was a clear breach of this condition, if the bond was not void.

If the final order gave Lewis the privilege of obviating the

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money decree by the delivery of the negroes within the time limited in that order, then the production of the slaves became an alternate condition; and, on non-compliance with it, the bond called for the money: so that the eventual breach was the non-payment of the money,—the equivalent or substitute of the negroes.

But it has been argued that the commissioner had no authority to require a bond from a defendant in equity, obliging him to pay whatever sum might be eventually decreed against him in money, whether decreed alternatively or directly.

This objection necessarily implies that although the condition of the bond in this case, for the payment of money, is broken by the failure to pay it;—yet the Court of law is to regard it *no breach*, (contrary to the very words of the instrument,) if it can be satisfied that the commissioner erred in inserting that condition.

This proposition palpably involves the question, how far one co-ordinate Court is authorized to enquire into, or review, the proceedings in another co-equal and co-ordinate Court of superior and undefined jurisdiction.

Now, it is freely admitted that there is a boundary to the authority of every Court; and if it transcends that boundary its acts are null. As if a Chancery Court were to assume a criminal jurisdiction, and try, convict and punish in capital cases. Or, if a Law Court should assume chancery powers, and administer trusts. But it is a universal principle that the proceedings of all Courts, not of limited jurisdiction, upon subjects of which they have jurisdiction, are not examinable collaterally in any Court. Not in the same court;—because a collateral examination might serve to surprise the parties, and deprive them of the aid of those circumstances by which the proceedings might, if directly investigated, be sustained: take away the confirmatory effect of acquiescence, or consent, which may have cured the proceeding: and obscure the light which a more direct examination of the subject might afford the Court

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in coming to a proper decision. Not in a Court of concurrent jurisdiction: because, in addition to the reasons already given, such a course would necessarily lead to conflict of jurisdictions, to irremediable confusion of rights, and to intolerable oppression of the sureties. And certainly, not in merely a co-ordinate Court of diverse jurisdiction,—because in addition to all the reasons just given as to Courts of identical and concurrent jurisdiction, such a proceeding would amount to the assumption of a jurisdiction altogether foreign to the functions of the Court undertaking the examination.

In the latter case, it may be added that there would be a seeming trespass on the constitution under which all the Courts in this State hold their authority. That instrument vests the judicial power distributively, in such Courts of law and equity as the legislature may create and establish, and provides for a responsibility to the legislature for the administration of these judicial trusts. If one of the trustees, so to speak, should abrogate the act of another and distinct trustee, it would savor of the assumption of a duty for which he was not commissioned, and frustrate that other in an attempted performance of his appropriate duty: besides drawing his acts *ad aliud examen*, away from that forum constitutionally instituted for this investigation.

The true doctrine, it appears to me, is plainly this,—that the proceedings in all Courts of superior jurisdiction upon subjects within their cognizance, are valid until set aside: and can be set aside only in a direct proceeding for that purpose: which proceeding can take place only in the same Court, or in an Appellate Court sitting in the same jurisdiction.

The mere incorrectness of any proceeding in a cause, in any Court; its inaccuracy or want of exact conformity to the settled practice of that Court, do not so vitiate the proceeding itself as to render it null. There must be a want of jurisdiction on the subject matter to produce that result. The mode of administering its jurisdiction must be left to every Court: and

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no other Court can safely undertake to regulate its practice. Every Court,—and we have daily examples of the fact,—is liable to erroneous judgments both as to practice and doctrine; but it is not the province of any other Court to correct them. They are to be corrected only in the regular course of appeal, where the matter is drawn directly under examination.

Suppose a Court, in a matter of *ne exeat*, orders an injunction bond; and the party acquiesces; and the Court and the other parties, depending on what has been done, and not questioned, proceed to a final decree accommodated to that order and bond: what an injustice would be perpetrated if that Court should at a future day allow the party to take an exception which he had foregone at the proper time, and permit the record to be garbled, and the order and bond to be rescinded and set aside? How much higher injustice would be perpetrated if another and co-ordinate and not a superior Court, should undertake, not to set them aside or rescind them, but to pronounce them invalid?

The view I am taking is not new to me. So long ago as 1832, in my second year, I held the same doctrine. In *Maxwell vs. Conner*, (a) I upheld the erroneous judgment of the Law Court, because it was rendered on a matter within its jurisdiction: and I refused to review or correct it: and, moreover, although the same jurisdiction belonged to my own Court, as a concurrent Court, I denied a remedy to the party aggrieved, because, while entitled to it, in either Court, he had submitted to the erroneous judgment of a competent forum. My decision, in all the views I advanced, was affirmed by the Court of Appeals of that day.

I paid the same deference to the decision of a Court in a sister state, in *Johnson vs. S. W. R. R. Bank*, (b) however much I may have doubted its correctness.

JOHNSON, J., in *The State vs. Scott*, (c)—speaking even of an

(a) 1 Hill, Ch. 14.

(b) 3 Strob. Eq. 300; Id. 323.

(c) 1 Bail. 294, and see *State vs. Stewart*, 5 Strob. 31-2.

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inferior Court, created by statute for special purposes, said :—
“It is difficult to conceive of a proposition more obvious, than that, *prima facie*, every Court must possess the power of judging of its own jurisdiction, both in relation to the persons of the parties and the subject matter of litigation :” and held that the party having submitted to the jurisdiction, afterwards came too late to correct the judgment.

In *Gist vs. Bowman*, (d) we have a singular proof of the extent to which matters would proceed if it were permitted to one Court to invalidate, or disparage the proceedings of another collaterally. An attachment had been issued to compel an answer in chancery ; and a discharge under *habeas corpus* was moved for on the ground that a single Chancellor could not authorize the attachment. It seems the point was gravely debated, but, as might have been expected, the Judges “were all of opinion, that they had no jurisdiction of the matter : it belonged exclusively to the Court of Equity.” The case is amusing as well as instructive. Would that Court have discharged Kirkland if he had applied to them before giving his bond ? or would it have said it “had no jurisdiction of the matter :—it belonged to equity ?”

Ex parte Gilchrist, (e) was a case in which the applicant was in custody under a writ of *ne exeat* issued by the commissioner in equity for Chester, and moved for discharge on the ground, that the bill filed did not state a case in which the commissioner had power to order a writ of *ne exeat*. HUGER, J., refused to look into the bill for such a purpose. Upon appeal, JOHNSON, J., delivered the opinion of the Court in terms so manly and so wholesome that I shall take the liberty of repeating here several passages from his judgment. “The Act,” says he, “invests the commissioner with the power of the Chancellor in relation to granting orders for the writ of *ne exeat*, in all cases of practice.” “In the organization of the judicial department of the government, certain powers were assigned to the different tribunals,

(d) 2 Bay, 182.

(e) 4 McC. 238.

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corresponding with the nature and extent of the jurisdiction confided to them: and, in the exercise of those powers,—except so far as the right of *appeal* is given,—the most subordinate are as absolute and authoritative as the tribunals in the last resort.” “And I should deprecate,—even more than the repeal of the *habeas corpus* Act,—that state of things in which tribunals, *without the forms of law* would be permitted to *review* and control the judgments of each other *ad libitum*. The *habeas corpus* Act certainly confers no such power. Its object was to secure the citizen from illegal and arbitrary imprisonment: and the wildest speculations have never yet carried it so far as to subvert all law and order: for, even in the case of *Yates v. Lansing*, (f) than which, perhaps, no case was ever more warmly contested, the bone of contention was *whether the Chancellor had jurisdiction over the subject matter* for which he caused the plaintiff to be attached.” “The presiding Judge had no more power to discharge” the prisoner “than the commissioner would have had to discharge a culprit committed for execution by a Court of Sessions.”

This is sound, conservative, and wholesome doctrine. The Court would not inquire whether *the case* authorized the issue of a *ne exeat*: but leaving that inquiry to the review of the Court in which the order was made and whose jurisdiction was concerned, dismissed the application, as unauthorized by sound principles of proceeding. I beg that this judgment may not be forgotten, when we hereafter touch upon the question, whether the order of Mr. Aldrich was justified by the circumstances of *the case* before him.

In *McKee vs. Council of Anderson*, (g) the case turned upon the question, whether the tribunal whose decision was under consideration, had or had not jurisdiction of the subject matter, and being found to have it, the Court refused to interfere.

In *Brown vs. Gibson*, (h) when the power of an Ordinary to revoke probate of a will made by his predecessor was ques-

(f) 4 Johns. R. 317; 5 Id. 282; 6 Id. 337. (g) Rice, 24. (h) 1 N. and McC. 326.

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tioned, all the parties in interest not being before the Court, JOHNSON, J., said: "The decree of the Court of Ordinary, revoking the probate of the will, was the judicial act of a court possessing jurisdiction over the subject matter of dispute, and the law holds the exercise of this right so sacred, that no evidence will be permitted to control it, in relation to the subject of dispute, *so long as it remains unreversed* by the order of a superior tribunal; (i) and this can only be done *on an appeal* to the Court of Common Pleas, in the manner pointed out by the Act of Assembly."

And in *Starke vs. Woodward*, (k) where after going into equity for the assertion of title to negroes, and losing his case, the defendant resisted the plaintiff's title at law, and undertook to contest the decree in equity which had been rendered against him, Justice NOTT, in a very clear opinion ruled the case against him, referring to authority to sustain the position that the judgment of a competent tribunal on a subject of its jurisdiction is conclusive, so long as it stands, on all other tribunals. The cases mentioned by him are clear to the point: among which is that of *Maingay vs. Gahan*, (l) where Lord Chancellor Fitzgibbon, sitting with all the judges in the Exchequer Chamber of Ireland, says, "sitting in a court of law, I am not at liberty to enter into an examination of the justice or injustice of any judgment of a court of *competent jurisdiction*, unless it comes before me by a writ of error. All parties to such a judgment are bound by it, until it is *reversed* by a court having authority to *review* it."

Harvey vs. Huggins, (m) covers nearly every principle involved in the present case. Harvey had obtained a decree in equity against one Murrel for about \$6,000: and, in order to compel payment of this sum, sued out and lodged with Huggins, the sheriff, successively a *fi. fa.*, an *alias*, *pluries* and second *pluries*. The first *fi. fa.* and the *alias* were returned *nulla bona*. Under the first *pluries* Murrel's land was sold; and under the

(i) Toller, 76. (k) 1 N. and McC. 329, note. (l) Irish Term R. 1. (m) 2 Bail. 252.

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second *pluries* three of his negroes. These sales left due on the decree four thousand five hundred dollars.

Previous to the issuing of the second *pluries*, upon affidavit that Murrel was preparing to remove certain of his negroes out of the jurisdiction, Chancellor De Saussure ordered that a writ in the nature of a writ of *ne exeat* issue, "to compel Murrel to give bond with sufficient sureties" that he would not remove the property. Murrel was arrested, and was subsequently permitted by the sheriff, to go at large, without being legally discharged. The escape was permitted after an ineffectual application had been made to Chancellor De Saussure to set aside his order. Harvey brought an action against Huggins, the sheriff, for the escape, and got a verdict; and on a motion by way of appeal to set it aside, O'NEALL, J., delivering the opinion of the Court, after stating the grounds taken in support of the motion, the first of which was, "that the process under which Murrel was confined was void," proceeded to say: "To establish the first ground, it ought to have been shown that the Court of Equity had *no jurisdiction* of the case in which the process was issued." "But it is conceded that the Court *had jurisdiction*: and the whole force of the objection is, that the process was not according to the *practice* of that Court, and not warranted by *it*. This, I have no doubt, *is true*: and I have as little doubt, that, on a *proper application* by Murrel, the *Court of Equity* would have *set it aside*. But this not having been done, it is a subsisting process of a Court of *competent jurisdiction*, in a *cause* within its jurisdiction. In a court of law, it must be taken to have been regularly issued; for each court is the *judge of its own proceedings*. Both are co-ordinate tribunals, possessing equal powers over the cases, respectively, within the jurisdiction of each; and neither has the right to *look into, or correct*, in *point of form*, the proceedings of the other." This is a very important judgment, and I trust that no part of it will be forgotten in the discussion of other points hereafter to be noticed in this case.

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It will be observed that I have quoted no cases but those of our own courts, and none, hardly, but those of courts of law. I could extend the list of cases, almost indefinitely, by referring to those of foreign courts and our own cases in equity, all of which are to the same effect. But I stop here, having demonstrated, as I conceive, that if this Court, sitting as a law court, and administering a law jurisdiction, in a law case, should undertake to annul the bond now in suit, or the order under which it was taken, from an apprehension that the papers are not in conformity to equity practice, it will contradict the well settled doctrine of our law courts themselves.

I assume that the Court in which I now sit is as to this case purely a law court. As a law court, it is, in this case, superior to the law court from which the case comes; because that case is brought directly before it, by way of appeal, for review. But in respect to the proceedings in equity, which are not appealed from, it is as strictly a co-ordinate court as are the Circuit and Appeal Courts in law. It has no right to review, collaterally, the proceedings in equity; but must give effect to them, as subsisting judicial records, until they are vacated in the regular way.

In this discussion I have also hitherto assumed, that the acts of the commissioner were acts within his jurisdiction, and which he was competent to perform; and I have furthermore assumed, that however irregular his practice may have been, they were done under the supervision of the Court, and constituted, when performed, parcel of the proceedings in the case; and, as such, part of the record.

Am I right in these assumptions? The commissioner is not merely a ministerial officer. His acts are not, in all cases, merely ministerial. This officer is not the creature of statutory law; but existed, with powers and functions established by usage, anterior to any enactment in this State. By statute he is authorized to make all orders which a Chancellor could make in the preliminary stages of causes in court, so as to

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prepare and clear the way for a full and unobstructed decision of each case, according to its character when it comes on to be heard. And in his common law character, he is authorized to do all acts, ancillary to the Chancellor, to enable him to make a just and efficient final disposition of the case. All these acts are done under the control and supervision of the Chancellor: and, when brought regularly before him, may be corrected, modified or rescinded. But, if acquiesced in, or cured by consent, they remain as proceedings in the cause.

Now, if the order passed by Mr. Aldrich was not regular, according to equity practice, was it proper in the parties affected, to steal away to another distinct *forum*, to get its opinion on the matter, instead of making their complaint in the regular way, and in due form, in the Court where the irregularity or injustice was done? a Court which, alone, was entitled, and bound, to investigate the particular circumstances by which the act done might be justified or condemned: which alone could bring these circumstances before it by a direct examination; and which may be supposed as well qualified, at least, to judge of and regulate the practice and the doctrines of its jurisdiction, as another and foreign court.

When one independent court undertakes to investigate the practice, the powers, and the principles of another distinct court, it is liable to many mistakes; and if it infers from the past, what ought to be its present modes of procedure, it subjects itself to much error of judgment. For example, the order made in *Harvey vs. Murrel*, and referred to in *Harvey vs. Huggins*, was thought by a law Judge to be quite extraordinary; and yet, it would bear much discussion in an Equity Court, whether the circumstances of the case did not call for just such an order. Again, if before *Gadsden vs. The Bank*, the question had been submitted to the opinion of a law court, whether such an order as was made and approved in that case, was justified by equity precedents, it might have entertained very grave doubts on the subject. I turn, again, to *Young vs.*

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Burton, where the equity jurisdiction in relation to the delivery of specific slaves was for the first time established ; and I ask, with sincerity, if before that decision, a master, or commissioner in equity, had made an order looking to such a remedy as that case legitimated, would a law court have regarded his order as conforming to the practice within the equity jurisdiction ?

It is not necessary in this case to establish the exact propriety of Mr. Aldrich's order. It is sufficient if he was acting within his jurisdiction when he made it. But I may be permitted to look a little to the circumstances in which he passed the order, for the purpose of discovering whether he committed so great a trespass as has been suggested.

The bill was one in which the allegation, sworn to at the time, and never at any time contradicted, was that a life-tenant, himself a trustee for those in remainder, had sold a trust slave and pocketed the proceeds to his private use, and had, without authority, vested cash trust funds in slaves, taking the title to himself, and was embarrassed, and on the eve of absconding with all his tangible property. The prayer of the plaintiff in that case was for specific relief by a decree for the negroes, or for an account of their value. This was the case before the commissioner and in which he was to make an interlocutory order to remove all impediments to a fair and full decree, such as the plaintiff in such a cause was entitled to. Would it have been an unfair, or improper final decree in such a case for the Court to have directed that the negroes be delivered up, and that the defendant be excused from that judgment only upon paying their ascertained value ?

From the bill, would not Mr. Aldrich have been justified in anticipating that such a decree might eventually be made ? I am not sure that it was not made in 1851. But be that as it may, Mr. Aldrich had a duty to perform suited to the nature of the bill before him : and he was no prophet, but was obliged to do the best he could. Did he make a very great mistake ?

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It must be remembered that, according to the case of *Fraser vs. McClanaghan*, (n) if a party entitled to the delivery of specific slaves, files a bill for that purpose, and some of the slaves die *pendente lite*, he is entitled to a decree for the value of the negroes, in lieu of, and as a substitute for the negroes themselves. It is an incident of such a case. How could Mr. Aldrich know that some of these slaves might not die during the suit? One of them did die, and that by the hands of the defendant to the cause, and he spirited away his property in another; and shall he or his privies make advantage of his own wrong?

It has been said there was no evidence before the Chancellor of the devastavit of the defendant by misinvesting the trust funds, and, therefore, his decree cannot have had any reference to the delivery of the slaves wrongfully purchased. Suppose this were granted, how could Mr. Aldrich know when he made his order, that there would be such an omission at the trial? But is the fact as stated? Why,—was not the bill taken *pro confesso*? and had not the Chancellor the evidence of the defendant's own admission?

Those who will consult and carefully consider what is said by Chancellor Walworth, in *Mitchell vs. Bunch*, (o) in relation to practice in Courts of Equity, and particularly to the practice in the English Court of Exchequer, will hesitate much in accusing Mr. Aldrich of a very palpable blunder.

But conceding every irregularity that can be imagined, is it certain that the order, and especially the bond given under it, should be disregarded? Is it certain that the bond was not drawn up and tendered, in the terms so much objected to, by the obligors themselves, and not extorted by Mr. Aldrich? How can that be known, when the inquiry is made *apart from all circumstances* into the *naked authority* of the commissioner;

 (n) 2 Strob. Eq. 227. (o) 2 Paige, 617. See also his observations in *McNamara vs. Dwyer*, 7 Paige, 244.

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and the bond is to be set aside on that abstract view of the matter ?

I suppose, if the order had been for a pure *ne exeat* bond, the defendant in the suit might have placed a sum of money in the hands of the commissioner, to satisfy the final decree ; or he might have declined to give a *ne exeat* bond, or ask any sureties to join him in one, if his settled intention was to leave the State never to return ; and, if under these circumstances he had done either of these things, would the securities given have been void, or the commissioner wrong ?

Analogous to the last case just suggested was the case of *Jessup vs. Hill*, (p) where one of the defendants to the suit had been arrested upon a *ne exeat*, and after giving bail, by agreement the *ne exeat* was discharged, upon his executing bond to answer the bill and abide the final decree. A future application for the delivery up to him of this bond was refused ; although under other circumstances it might have been granted.

The bond in the present case must be held, in this Court, to have been well taken. If the parties had chosen to question it, they would have been heard on a motion in equity to set it aside. And again, when the bond was ordered out of that Court for suit, they might have opposed that motion. Having neglected both these legitimate grounds of relief, they should not be heard here.

I hold it to be clear that when a security, taken in Chancery, is issued, for suit, by that court ; although all extrinsic grounds of defence may be raised against it, yet the authority of the obligee, acting as the agent of the Court, to take it, can never be set up as a defence to the instrument.

I am of opinion the nonsuit should be set aside.

Motion dismissed.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF ERRORS OF SOUTH CAROLINA,

Columbia, May Term, 1855.

ALL THE JUDGES AND CHANCELLORS PRESENT.

A. WHITE *vs.* BRYANT KAVANAGH.

K. purchased land, paid part of the purchase-money, and gave his note for the balance, with C. as surety. The conveyance was made to C. who on the same day signed a paper promising that, when relieved from his liability as surety, he would make such conveyance of the land as K. should direct. K. afterwards paid the note, and, by his direction, C. thereupon executed a second paper, declaring that he held the land as trustee for the sole and separate use of the wife of K. for life, and after her death to the use of K. for life, and after the death of the survivor, to the use of the children of K.: *Held*, that K. had, neither before nor after the second paper was executed, such present interest in the land, during the lifetime of his wife, as could be levied on and sold by the sheriff under a *fi. fa.* (a)

Doubted whether the sheriff could levy on and sell K.'s future interest in the land under the second paper.

(a) Other questions were made in the Circuit Court and Law Court of Appeals, which do not appear in any opinion. The plaintiff contended, 1. That the transaction between Coghlan and Kavanagh was fraudulent as against the creditors of Kavanagh; that the deed from Spain to Coghlan might, therefore, be treated as void, and so treating it, Coghlan had shown no title, and the plaintiff might rely upon the estoppel as against Kavanagh: and 2, that Coghlan had no right to come in and defend the action under the rule of Court. These positions were, it is presumed, overruled by the Law Court of Appeals.

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Under a *fi. fa.*, a sheriff can levy on and sell land only where the debtor has a legal estate, or such a trust as is contemplated by the 10th section of the statute of frauds. (b)

A use can result only to the party who makes the conveyance—not to a third person.

The 10th section of the statute of frauds contemplates only a case where the trust is a clear and simple one for the benefit of the debtor.

A resulting trust is not the subject of levy and sale by the sheriff under a *fi. fa.*

BEFORE WHITNER, J., AT SUMTER, FALL TERM, 1854.

To a full and proper understanding of this case, it is only necessary to add, to the clear statement contained in the opinion delivered in the Court of Errors, that the judgment against Kavanagh in favor of Hendrix, was founded upon an old judgment signed 10th March, 1836.

The case was argued in the Law Court of Appeals, in December, 1854, and that Court ordered it to the Court of Errors, where it was now heard.

Richardson, for appellant. The general question, which the law Court of Appeals has sent up to this Court, will be considered, in the argument, under three heads:

1. Whether Kavanagh took a legal estate in the land prior to the execution of the deed of the 11th September, 1851; and, if so, then, whether the execution of that deed did not so effectually annihilate and destroy his estate as to defeat the lien of the judgment.

2. If he took only an equitable interest, then, whether such

(b) If the estate of the *cestui que trust* is, since the statute of Geo. II., subject to levy and sale under a *fi. fa.*, can any greater interest be levied on and sold than is subject to the writ of *elegit* according to the English law? R.

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an interest in land, can, in any case, be levied upon and sold under a *fi. fa.* at law.

8. If the 10th section of the Statute of Frauds does authorize such levy and sale, then whether Kavanagh had such an interest as is within that section of the statute, before the deed of the 11th September, 1851, was executed; and, if so, then, whether the execution of that deed did not destroy his interest, and defeat the creditor's right to have the land levied on and sold.

1. There are but two modes by which Kavanagh could be held to have taken a legal estate in the land prior to the execution of the deed of the 11th September, 1851; (1) As a resulting use; and (2) under the paper executed by Coghlan, of date July 11th, 1850.

That Kavanagh did not take a resulting use is clear; for all the authorities agree that a use cannot result except to the grantor or owner of the land; (Crabb on Real Prop., § 1641, et seq; 1 Cruise Tit. 11 ch. 4 § 39; 4 Kent, 299; 1 Preston on Estates, 182;) and Kavanagh never was the grantor or owner. A use might have resulted to Spain or Coghlan, but not to Kavanagh. When Kavanagh paid the purchase money, a *trust* resulted to him, (4 Kent, 305,) but not a use.

Then, did Kavanagh take a legal estate under the deed executed by Coghlan, on the 11th July, 1850? If that instrument can be held to operate as a conveyance, it can only be as a declaration of uses; for it is certainly not a common law conveyance, nor is it a bargain and sale, a release under our statute, a covenant to stand seised to uses, or an appointment under a power. As a declaration of uses, then, it must stand or fall.

In considering the construction and effect of that instrument, two things should be borne in mind; (1) That the Court is called upon to construe and give effect to a deed, and not to a

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will—to an instrument operating *inter vivos*, and not to a devise, where the party may be supposed to be *inops consilii*; and that the rules of construction in relation to deeds and wills, are widely different. (2) That whatever may have been the rule before the year 1672, when the Statute of Frauds was enacted, it is clear that since that statute all declarations of uses must be in writing; (Bac. Abr. Uses and Trusts (E.); Burton on Real Prop. m. p. 60, pl. 168,) and of course the writing is subject to the general rule, that it can neither be added to, varied, or explained by parol. Bearing these two things in mind, and assuming for the purposes of the argument, that the deed signed by Coghlan on the 11th July, 1850, was intended to operate as a declaration of uses, he would now proceed to show by a few plain and well-settled elementary principles, that that deed conveyed no legal estate whatever to Kavanagh. The idea entertained upon the opposite side is presumed to be this: That when Kavanagh relieved Coghlan of his liability on the note for one hundred and fifty dollars, by payment, *eo instanti* and *per vim statuti*, the legal estate in fee became vested in Kavanagh. If he, Kavanagh, took any estate at all, it is conceded he must have taken an absolute one; for it would be absurd to hold, that he took either an estate for life or for years. It is a rule of construction, applicable as well to common law conveyances, as to conveyances operating under the Statute of Uses, that a party claiming an estate under a deed, must show by the terms of the deed itself, what that estate is; and he cannot claim an estate in fee simple, unless the limitation be to him *and his heirs*. “To the creation or transfer of an estate in fee by deed, it is requisite that the land, or other subject of property should be limited, as to individuals, to the individual and his heirs.” 2 Preston on Estates, 1. “No substituted words of perpetuity will, except in special cases, be allowed to supply their place. Therefore, a grant in a deed to a man and his assigns, or to him and his assigns forever; or in fee simple, by that term, &c., will not, by reason of the omission of a limitation to

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the heirs, pass more than a life estate." 2 Preston on Est., 4, 5. And the same rule, says Mr. Preston, p. 66, applies to conveyances under the statute of uses. In 2 Shep. Touch. 520, the rule is thus laid down: "The declaration of the uses must be certain, and that especially in three things; in the person to whom, in the lands, &c., of which, and in the estates by which the uses are declared; and if there want certainty in either of these particulars, the declaration is not good." In Burton on Real Prop., m. p. 58, pl. 164, (Law Lib., vol. 23,) it is said: "It remains here to say something of the manner in which uses are declared. As the use now carries with it the legal estate, the word heirs is necessary to constitute a fee simple; and in general the same words must be used to ascertain the quantity, (i. e. the extent and duration) of the estate, as at common law." Tested by these rules, what estate is conveyed to Kavanagh by the terms of the deed signed by Coghlan on the 11th July, 1850? Coghlan undertakes "to make such deed of conveyance of the said lot of land, as the said Bryant Kavanagh may direct by parol, deed, or will." These words convey no estate to Kavanagh, and certainly they do not convey to him an estate in fee simple. They merely give him authority to declare to whom the conveyance shall be made. Authorities may be found, (perhaps they amount to nothing more than *dicta*,) that similar words in a *devise* would confer a legal estate in fee simple; but it is too clear that those authorities have no application where the question is upon the construction of a deed. In 1 Sug. Pow. 119, § 8, almost the very case before the Court is put. "It is said," says that learned and cautious writer, "that where an estate is given absolutely, without any prior limited interest, to such uses as a person shall appoint, it would be an estate in fee. But this doctrine," he adds, "refers only to a devise, for in a conveyance such a limitation would merely confer a power on the party, and not give him an estate in fee." This authority, it is submitted, if it be good law, is conclusive. In the case put by Sir Edward Sugden, the party has the un-

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controlled and absolute power of appointment, and might make the appointment to himself; and yet he takes a mere power and no estate. In the case before the Court, Kavanagh has no power of appointment; he has only authority to direct to whom the appointment shall be made. Assuming, therefore, that the deed executed by Coghlan on the 11th July, 1850, was intended to operate as a declaration of uses, it signally failed of its purpose, for want of apt words declaring the estate which Kavanagh should take.

But there is another fatal objection to that instrument as a declaration of uses. The case of *Craig vs. Pinson*, Chev. 272, seems to have been intended to hold, that under our Act of 1795, all conveyances of land are required to have two witnesses. Coghlan's deed of the 11th July, 1850, has but one. If, therefore, that instrument had purported to convey the land to Kavanagh by words the most formal and technical, it would have failed of its purpose, because of the want of the legal number of subscribing witnesses. Surely this Court is not going to hold that two witnesses are required to the formal and common conveyances of the country—to releases, feoffments, bargains and sale, covenants to stand seised to uses, and even to mortgages, which create but a lien, and at the same time hold, that so informal an instrument as this is, can pass the legal estate, with or without witnesses.

It is now submitted that the paper supposed to be a declaration of uses is no conveyance at all,—was not intended to operate as such,—and is nothing more than a covenant or agreement; for breach of which, at law an action of covenant would lie, or in equity, a bill to enforce the specific execution. This is the plain common sense view of that instrument; and with as much propriety could a bond or note to make title upon payment of the purchase money, be held to operate as a bargain and sale upon the money being paid, as this instrument be held to operate as a declaration of uses. The law upon this subject is thus laid down by Crabb, vol. 2, m. p, 468, § 1638:

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“The words of the statute upon this subject are bargain, sale, feoffment, fine, covenant, &c. There must, however, in all cases, be either a conveyance operating by way of transmutation of possession, or a contract or covenant operating as a bargain and sale, or a covenant to stand seised to uses. *Mere contracts or agreements referring to actual conveyances do not raise uses at law under the statute*; so, where the covenant is merely executory, for in that case the action of covenant is the proper remedy; and it is the same in equity.”

If after Kavanagh had satisfied the note to Spain, Coghlan had refused to execute such conveyance as Kavanagh had directed, what was the remedy? an action of covenant at law, or a bill in equity to compel him to execute the conveyance, is the answer.

Let us now suppose that Kavanagh took a legal estate before the deed of the 11th September, 1851, (which has two subscribing witnesses,) was executed by Coghlan. The execution of that deed, it is now submitted, so completely destroyed Kavanagh's previous interest, as to destroy the lien of the judgment upon that interest. If the deed of the 11th September, 1851, had been a mere transfer of Kavanagh's estate to the trusts created by that deed, it is clear that the lien of the judgment would have followed the estate, and attached upon those trusts. But such is not the case here: no estate ever vested in Kavanagh, passed to the *cestui que trusts* under that deed. They derive their interest directly and immediately from Coghlan, and not from or through Kavanagh. If an estate be conveyed to A. and his heirs, to the use of B. and his heirs, until C. return from California, and then to C. and his heirs, upon C.'s return from California, *ipso facto* and *per vim statuti*, all estate which had ever been vested in B. falls to the ground, together with all liens and incumbrances created by B. upon it—the legal estate, by the magical operation of the Statute of Uses, returns to A., the trustee, and through him a new estate in fee passes to C., discharged, of course, of all liens and incumbrances

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whatever. Such is the doctrine of all the elementary writers, and they all concur in holding that exactly the same thing takes place when the new uses spring into existence under the execution of a power of appointment. For instance, an estate is conveyed to A. and his heirs, to such uses as B. should by deed appoint, and in default of appointment to B. and his heirs. Now B. has an estate in fee, coupled with a power of appointment. If upon B.'s estate in fee liens and incumbrances should attach, and B. should afterwards execute the power of appointment, it seems clear, from the authorities, that he not only annihilates his own estate in fee, but destroys all the liens and incumbrances which he himself had created upon it. This results from the rule that when a power is executed, the deed containing the execution of the power relates back to and is read as part of the original instrument. The case of *Roach vs. Wadham*, 6 East, 289, is an instructive case on this point. That case may be briefly stated thus: an estate was conveyed to a trustee in fee to such uses as A. should by deed appoint, and in default of appointment to A. in fee. There was a fee farm rent reserved in the conveyance to the trustee, and A. covenanted to pay it; and this was held to be a covenant running with the land. The original deed, therefore, gave A. an estate in fee, encumbered it with the rent, and also gave A. a power of appointment. A. afterwards executed the power of appointment; and it was held that the appointee took the estate freed and discharged of the incumbrance. It was admitted that it would have been different, if A., instead of executing the power of appointment, had simply conveyed his estate to a purchaser. (4 Kent, 337-8). *Ray vs. Pung*, 5 B. & Ald. 561, (7 Eng. C. L. R. 193,) also illustrates the power of the statute in such cases. There lands were conveyed to A. to such uses as B. should by deed appoint, and in default of, and until appointment, to the use of B. in fee. B. therefore had an estate in fee; and being a married man, the incumbrance of his wife's right of dower attached upon that estate. He

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also had a power of appointment. He afterwards executed the power of appointment, and it was held, that the appointee took the estate divested of the incumbrance of dower. But the case of *Doe vs. Jones*, 21 Eng. C. L. R. 113, decides the very question before the Court. There A. B. had the use for life, with a power of appointment. Judgment had been obtained against him, but before *elegit* sued out he executed the power of appointment. Held, that the execution of the power defeated the creditor's lien. These principles and authorities, it is submitted, show that when Coghlan, under the power reserved in his deed of the 11th July, 1850, executed the deed of the 11th September, 1851, the estate in Kavanagh, if he had any, disappeared, and new estates, not derived from or coming through Kavanagh, but growing directly out of Coghlan's seisin, sprung into existence, and that these new estates are not subject to any lien or incumbrance to which Kavanagh's estate was subject.

2. It will now be assumed, that Kavanagh took no legal estate, but only an equitable interest of some sort; and the next question in order, is the general one, whether the interest of a *cestui que trust* in lands is, under the 10th section of the statute of frauds, subject to levy and sale under a *fi. fa.* at law. In *State vs. Laval*, 4 McC. 340, Judge Nott discusses the question, whether an equity of redemption at common law can be sold under a *fi. fa.*, and he uses the following broad expression: "a *fi. fa.* can operate only on a legal estate." The truth of that *dictum*, in its widest and broadest sense, it is my purpose now to maintain. Before the year 1289, when the Statute of Westminster 2, was passed, lands were only subject to what is known at the common law as the writ of *levari facias*; and this writ only authorised the sheriff to seize the present profits of the land, and deliver them to the plaintiff in execution, in satisfaction of his debt. By the Statute of Westminster 2, the writ of *elegit* was given to the plaintiff. This writ authorised

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the sheriff, through the agency of commissioners, to allot one moiety of the land to the plaintiff in execution, who thus became tenant in *elegit*, and entitled to hold that moiety only until out of the profits his debt was satisfied. Watson on Sheriff, ch. 11, p. 206, (Law Lib.); 3 Bl. Com., ch. 26, p. 417, et seq. So stood the law in relation to legal estates (trust estates being subject to neither writ) down to the year 1672, when the statute of frauds was enacted. By the 10th section of that statute the interests of *cestui que trusts* were, in certain cases (not necessary to be now stated) made subject to execution at law. The question now is, what did the statute mean, when it subjected trust estates to execution? Did it mean that they should be subject to levy and sale under a *fi. fa.*? Surely not. It meant that they should be subject to the executions then known to the law, by which the profits of legal estates in lands could be reached. They, trust estates, became subject to the *elegit*, or *levari facias*, but not to the *fi. fa.* Watson on Sheriff, ch. 11; 3 Bl. Com., ch. 26. The argument it would seem might rest here; for how a statute, which meant when passed, that only the present profits, or the profits of a moiety of the land, could be taken in satisfaction of the debt, can now be held to mean that the fee simple estate in the whole land can be seized and sold by the sheriff, it is difficult to understand. A statute cannot mean one thing to-day and another to-morrow. It means throughout all time to come exactly what it meant the day it was enacted. It may be modified, repealed, or altered, by subsequent legislation; but no subsequent legislation, no change of circumstances, can alter its meaning. But it is not proposed to rest the argument here. In the year 1712, the statute of frauds, together with other British statutes, and the great body of the common law, was adopted in South Carolina. It would seem that the Statute of Westminster 2, which gave the writ of *elegit*, was not expressly made of force by the Act of 1712; but there can be but little question that the writ itself was used in this State, it being considered as belonging

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to the common law. At any rate the writ of *levari facias* came over with the common law; and it is clear that in 1712 there was no law which authorised the sheriff to levy and sell lands under a *fi. fa.* When, therefore, the provincial Legislature of this State adopted the statute of frauds, it, the statute, meant with us *no more* than it meant in England. It may have meant less, *i. e.*, that the lands should only be subject to the *levari facias*. It clearly did not mean that they should be subject to levy and sale under a *fi. fa.* This brings us down to the year 1732, when the Statute of George II. (2 Stat. 570), was passed. That statute subjected "the houses, lands, negroes, and other hereditaments and real estates" of the debtor to levy and sale under a *fi. fa.* *D'Urphay vs. Neilson*, 4 McC. 129. But that statute has never been held to apply to equitable estates. Indeed the contrary may be said to have been more than once expressly ruled. The statute, it will be observed, uses the word "negroes," as well as "houses, lands," &c. Now if the word "lands" can be held to embrace an equitable interest in lands, surely the word "negroes" must embrace an equitable interest in negroes; and yet it is well settled, that the interest of a *cestui que trust* in negroes, is not subject to levy and sale. *Brown vs. Wood*, 6 Rich. Eq. 167; *Rice ads. Burnett*, Sp. Eq. 585. An argument may be drawn from the 15th sect. of the statute of frauds, which seems strongly to support the position taken, that the words of the Statute of George II. do not embrace equitable interests. That section gives the judgment a lien upon the "lands, tenements and hereditaments" of the defendant; but these words have never been held to embrace equitable interests. Such interests may be alienated after judgment signed and before execution sued out. 1 Cruise, tit. XIV., sect. 71, 72; *Hunt vs. Coles*, Comyn's R. 226. If the words "lands, tenements and hereditaments" in the statute of frauds do not embrace equitable interests, so as to give the judgment a lien upon such interests, can it be held with consistency that the words "houses, lands, and other hereditaments

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and real estates," inserted in our *fi. fa.*, in virtue of the provision of the Statute of George II., authorise the sheriff to levy and sell such interests?

8. This brings the argument down to the third general head, which will be disposed of very briefly. It is submitted, that before the execution of the deed of the 11th September, 1851, Kavanagh had the following interests and no more. 1. Because he paid the purchase-money, he had a resulting trust; and 2, he had the right under the agreement, signed by Coghlan, of the 11th July, 1850, to direct to whom the conveyance should be made. Is either of such interests such a trust as is contemplated by the 10th section of the statute of frauds? It has been repeatedly held in this State, that a resulting trust is not subject to levy and sale under a *fi. fa.* *Harrison vs. Hollis*, 2 N. & McC. 578; *Bauskett vs. Holsonback*, 2 Rich. 624; *Thompson vs. Peake*, 7 Rich. 373. Then is a mere authority to direct to whom the conveyance shall be made, an interest which can be seized and sold by the sheriff? Is it anything more than a mere *chose* in action? It has been already shown from 1 Sug. on Pow. 119, sect. 8, that such a right is at most a mere power and not an estate; and from 2 Crabb, sect. 1638, that Coghlan's paper, dated July 11th, 1850, contains, in fact, nothing but a covenant. Can such a power, or such a covenant, be seized and sold by the sheriff?

The statute of frauds has been held to apply only to "clear and simple trusts for the benefit of the debtor." *Doe vs. Greenhill*, 6 Eng. C. L. R. 566. "The first and natural division of trusts," says Mr. Lewin, p. 21, "is into simple and special. A simple trust corresponds with the ancient use, and is where property is simply vested in one person upon trust for another." In the case now before the Court, the trust belongs to the class which is known as *executory* trusts, and is not a "clear and simple trust." "A trust is executory, when it is to be perfected at a future period by a conveyance or settle-

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ment, as in the case of a conveyance to B., in trust, to convey to C." 4 Kent, 304-5. "Trusts executory are peculiar to marriage articles, and those instruments, whether deeds or wills, in which by the express provisions of the instrument, the trustees are to convey, settle, or assure, the lands on which the instrument is to operate, &c.; thereby showing that the parties have a *further conveyance in their prospect and contemplation.*" 1 Preston on Est. 387-8. The trust, or rather covenant here, is to make such conveyance as Kavanagh shall direct. This is an executory, and not a clear and simple trust for the benefit of Kavanagh.

But again. We have seen that the judgment does not bind the estate of the *cestui que trust*; and that if the trustee convey the land, by the direction of the *cestui que trust*, after judgment entered and before execution sued out, the land is not subject to the execution. *Hunt vs. Coles*, Comyn's R. 226. In this case the execution under which the land was levied on and sold, was sued out on the 30th April, 1853, near two years after Coghlan had executed the conveyance by the direction of Kavanagh.

Upon the whole, it seems clear that the creditor's right must rest upon the deed executed by Coghlan on the 11th September, 1851. That deed gives to Mrs. Kavanagh a sole and separate estate during her natural life. It may be that the purchaser at sheriff's sale acquired Kavanagh's future interest for life under that deed. *That* is very questionable. But even if it be so, the purchaser at sheriff's sale has no present right of action. He must wait until Mrs. K.'s death; and then if Kavanagh should survive her, he will be entitled to the possession during Kavanagh's lifetime.

Moses, contra, cited, *Chudleigh's case*, 1 Co. 121, b.; 2 Stat. 466, 525; 1 Preston, 149; 1 Cruise, 277; *Willett vs. Sandford*, 1 Ves. Sr. 186; 1 Cruise, 270; P. L. 250; *Bogert vs. Perry*, 17 Johns. R. 354; *Jackson vs. Scott*, 18 Johns. R.

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94; *Jackson vs. Parker*, 9 Cowen, 81; *Jackson vs. Walker et al.*, 4 Wend. 462; *Bogert vs. Perry*, 1 Johns. Ch. 56; *Armstrong vs. Peirce et al.*, 8 Bur. 1901; *Bristow vs. Pegge*, 1 T. R. 758, note; *Doe vs. Greenhill*, 6 Eng. C. L. R. 566; *Dawson vs. Dawson*, Rice. Eq. 243; 2 Story, 439, et seq.; *Fearne* on Rem., 1 Am. ed. 351 et seq.; 2 Story, § 1201.

Bellinger, in reply.

The opinion of the Court was delivered by

GLOVER, J. This was an action of trespass to try titles to a lot of land in Sumterville. Under the seventy-second rule of Court, (Miller's Com. 44,) Thomas J. Coghlan, claiming to be the real owner, was permitted to enter himself on the proceedings as the defendant in the suit.

The plaintiff claimed under a conveyance from the sheriff to him which recited, that the land had been levied upon and sold as the property of Bryant Kavanagh, by virtue of an execution in favor of J. Hendrix. The judgment was signed the 30th of April, 1853, and the execution was entered in the sheriff's office on the same day.

For the defence it appeared, that Bryant Kavanagh had agreed to purchase the land from A. C. Spain for three hundred and fifty-one dollars; that he paid two hundred and one dollars and gave a promissory note for the balance of the purchase money, with Thomas J. Coghlan as his surety. On the 11th July, 1850, A. C. Spain conveyed the lot of land to Thomas J. Coghlan in fee, who, on the same day, executed the following paper: "I hereby acknowledge that the deed for five and four-tenths acres of land this day made by A. C. Spain, Esquire, was so drawn for the purpose of securing me against any loss that might accrue by reason of my securityship of B. Kavanagh, on the note for one hundred and fifty dollars, this day given to the said A. C. Spain, as the balance of the purchase

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money of the said lot of land. I also hereby undertake and promise to make such deed of conveyance of the said lot of land, as the said Bryant Kavanagh may direct, by parol, deed, or will, so soon as I may be relieved from my liability on the said note, either by payment or otherwise." Under this contract, Bryant Kavanagh entered with his family, and is still in possession.

On the 11th September, 1851, Coghlan executed a paper, in which the agreement of the 11th July, 1850, was recited, and acknowledging that the note had been paid by Kavanagh, and that by his direction, he, Coghlan, held the land "as trustee in trust for the sole and separate use of Julian Kavanagh, wife of said Bryant Kavanagh, for and during her natural life, and then from and immediately after her death, to the use of the said Bryant Kavanagh, for and during his natural life; and then, from and immediately after the death of the survivor of them, the said Julian and Bryant, to the use of Elizabeth Catherine Kavanagh, Thomas Daniel Kavanagh, Mary Eleanor Kavanagh, William Bryant Kavanagh, and Michael Christopher Kavanagh, children of the said Bryant Kavanagh, as tenants in common, their heirs and assigns forever." It was also in evidence, that Bryant Kavanagh is insolvent, and that his wife is still living.

Upon the above facts, the presiding Judge held, that the plaintiff was entitled to recover, and, under his instructions the jury found for the plaintiff the land in dispute and damages.

The defendant appealed, and moved for a new trial, on the following grounds:

1. That the proof made, showed that the legal title to the land is in Coghlan.
2. That the deed from A. C. Spain conveyed to Coghlan the legal title to the land, and it is still in him.
3. That the sheriff's deed to the plaintiff conveyed no estate

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or interest, because Kavanagh had none which could be levied upon and sold by the sheriff; or, at most, it conveyed only Kavanagh's contingent interest for life under the deed of the 11th September, 1851.

After argument in the Law Court of Appeals, the following order was made: "This case is ordered to the Court of Errors, two Judges, O'NEALL and WITHERS, requiring it. The only question to be argued and there decided is, whether the land levied on and sold by the sheriff of Sumter District, as the property of the defendant, was liable to levy and sale as his property under the *fi. fa.*"

Real estate, liable for the satisfaction of debts, may be made available for that purpose, either by the process of a court of law or equity—the forum in which creditors must seek their remedy will depend, generally, upon the interest or estate of the debtor. In considering the question referred to this Court, which concerns legal process alone, we will enquire,

1. What interest or estate in land may be disposed of under the writ of *fieri facias*?
2. If Bryant Kavanagh had such interest or estate in the land conveyed to the plaintiff by the sheriff?

In England various judicial writs were issued to enforce the execution of judgments against real estate. At the common law a *levari facias* was issued to levy the profits of the land, and, afterwards, the possession of the land was transferred to the creditor under an *elegit* or an *extent*, and the debt satisfied by an application of the rents and profits. The writ of *fieri facias* is a common law execution by which only the goods and chattels of the defendant were subject to levy and sale. In 1782, the Statute of 5 George II., c. 7, (2 Stat. 570,) was passed, which made "houses, lands, negroes, and other hereditaments and real estates," within the plantations in

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America, chargeable with debts, and subject to the like process as personal estate. In South Carolina the writ of *fiery facias* has since been made to conform to the provisions of this statute, and all lands or interests in real estate subject to levy and sale under legal process, may now be levied upon and disposed of by the sheriff under this writ. (*D'Urphey vs. Neilson*, 4 McC. 129, note; *Martin vs. Latta*, 4 McC. 128, and *Jones vs. Wightman*, 2 Hill, 579.) The legal estate must be in the defendant, and not a mere equitable interest or trust, unless it be a trust which is made liable to execution by the Statute of Frauds.

2. Our next inquiry is, Did Kavanagh have such an estate or trust in the land as the sheriff could have disposed of under a *fiery facias*?

By Spain's deed, which declares no uses, Coghlan was seised in fee, and unless his acknowledgment, made contemporaneously with his deed, and the subsequent declarations of trust have conferred on Kavanagh either a legal estate or a clear and simple trust, the land was not the subject of levy and sale under a *fiery facias*. The paper dated 11th July, 1850, does not operate as a conveyance, nor does Kavanagh take a legal estate under it. It is the evidence of his right to direct a conveyance, contingent upon Coghlan's discharge from his liability as a surety on the note, and on such a right the lien of a judgment does not attach, nor is it liable to levy and sale under execution. Even after he had paid the purchase money, no use resulted in favor of Kavanagh under his agreement to purchase. Before the Statute of Uses it was well established, that where a feoffment was made, a fine levied, or a recovery suffered, without any consideration or declaration of the use, the use resulted to the party by whom the estate was conveyed. (Gilbert on Uses, ed. Sug. 117-18; 2 Shep. T. 521.) The legal ownership never was in Kavanagh, and the law, therefore, would not limit and adjudge the use to him, but to the person

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who parted with the land. When the consideration money and interest were paid, a trust resulted in favor of Kavanagh; but such trusts are exclusively within the jurisdiction of a Court of Equity.

It is only on legal estates that legal process can operate, and the facts of this case show, that the legal estate has never been in Kavanagh. For the purposes of the trusts declared in the deed of 11th September, 1851, it is necessary that it shall remain in Coghlan. Admitting that it was in him, it was insisted in argument that under the tenth section of the Statute of Frauds, he was seised or possessed of such a trust as may be taken in execution for Kavanagh's debts. By the Statute of 1 Rich. III. ch. 1, uses were held to be extendable upon statute staple or merchant, and by the 19 H. 7, ch. 15, the lands of the *cestui que use* were made liable to execution for his debts, due by judgment. After the Statute of Uses this statute was held obsolete; and when uses were revived under the name of trusts, it was held by analogy to the old law of uses, that trust estates of inheritance were not subject to debts, nor were they assets in the hands of the heirs of the debtors. (Willis on Trustees, 115.) This led to the provision made by the tenth section of the Statute of Frauds, (2 Stat. 525,) applying to trusts the language of the Statute of 19 H. 7, respecting uses,—"That it shall and may be lawful for every sheriff or other officer, to whom any writ or precept shall be directed, upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner or wise seised or possessed, or thereafter shall be seised or possessed in trust for him, against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom thereafter execution should be so sued, had been seized of such lands, &c., of such estate as they be seized of in trust at the time of the said execution sued, which lands, &c.,

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by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued," &c. In *Doe vs. Greenhill*, (4 Barn. & A. 684,) Abbott, C. J., defining the trusts embraced in this statute says, "We think that the trust that is to be thus treated must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be, merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor." Coghlan was not seised and possessed in trust for Kavanagh. Spain's deed passes the fee without any declarations of trust whatever. When the balance of the purchase money was paid, according to the agreement of the parties, testified by the paper dated the 11th July, 1850, Coghlan may have been regarded as a trustee by implication, and bound "to make such deed of conveyance as Kavanagh may direct;" but the land was not simply vested in him upon trust for Kavanagh solely, which would constitute a clear and simple trust, and be subject to legal process under the provisions of the statute. If any trust did arise in favor of Kavanagh, it was a resulting or constructive trust, which is an equitable right, and not liable to levy and sale under a writ of *fieri facias*. (*Harrison vs. Hollis*, 2 N. & McC. 578; *Bauskett vs. Holsonback*, 2 Rich. 624.)

By the paper, dated 11th September, 1851, Kavanagh had an estate for life, in remainder, upon his surviving the determination of his wife's separate life estate; and it has been argued, that this estate may be seised and sold under execution. It has been held, that a vested remainder in fee in lands may be levied on and sold during the continuance of a life estate, because, says Johnson, J., the terms "houses, lands, and other hereditaments and real estates," cover every vested interest. (*Harrison vs. Maxwell*, 2 N. & McC. 347.) In that case the fee simple of the land was vested in remainder, and I am not

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prepared to admit, (if it were necessary to consider the question,) that the *lien* of a judgment attaches on a vested remainder in freehold, the possession of which the priority of other estates may entirely defeat, and that such a remainder is liable to levy and sale under execution. Perhaps a more satisfactory answer to the argument is, that the legal estate was in Coghlan, and, for the purposes of the trusts, remains in him; that no use was executed by the Statute of Uses, which is liable to legal process for the satisfaction of Kavanagh's debts, and that he had not such a trust as is made subject to execution by the tenth section of the Statute of Frauds.

Conceding that the plaintiff acquired the life estate of Kavanagh in remainder by the sheriff's deed, he can have no right of possession until the determination of Mrs. Kavanagh's separate life estate, and consequently, until her death he cannot maintain an action to try titles and recover the immediate possession, which is in the trustee as legal owner. Even the *cestui que trust* in possession can only be regarded as the tenant at will of the trustee.

We are all of opinion, that the lot of land, levied on and sold by the sheriff of Sumter District as the property of Bryant Kavanagh, was not liable to levy and sale as his property, under a writ of *fiери facias*.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., and O'NEALL, WARDLAW, WITHERS, WHITNER, and MUNRO, JJ., concurred.

It is, therefore, ordered that the motion for a new trial be granted.

Motion granted.

APPENDIX.

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia—May Term, 1832.

JUSTICES PRESENT.

HON. DAVID JOHNSON.

" JOHN B. O'NEALL.

" WILLIAM HARPER.

CHARLES BELL vs. ELIZABETH HUGHES, ADM'X.

Testator bequeathed to his two daughters E. and J. one thousand dollars to each, "to be paid in either money or negroes at their value," and to his son W. two thousand dollars—"negroes Lewis, Jane, Buck, Daniel, Bob and Prime, to be divided, according to valuation, between E., J. and W., to answer to the amount above bequeathed:"—*Held*, that the legacies were pecuniary and not specific.

In cases of doubt, Courts incline against construing legacies as specific.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

" Assumpsit on a promissory note.

"The defence extended to part of the note only. Elizabeth Hughes, the widow and administratrix of William Hughes, deceased, was the daughter of John Bell, the plaintiff's testator,

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and a legatee under his will. There had been a deficiency of assets, in the hands of the executors, to pay debts, and the legatees were called on to contribute. William Hughes having married Elizabeth, the legatee, first gave a bond conditioned to contribute his proportion, which was afterwards cancelled and this note given for a sum certain; intended, however, to meet only the amount for which he was legally bound to contribute. And it was contended for the defendant that the note was for too large an amount. This depended on the question whether the legacy to Elizabeth Hughes was pecuniary or specific, for that must determine how much William Hughes should contribute. It was admitted by counsel on both sides that if the legacy was pecuniary, the plaintiff should recover the whole note, but if it was specific then only a part.

“The clauses of the will of John Bell, deceased, connected with this question are as follows:

“‘To my daughter Elizabeth Hughes I give and bequeath one thousand dollars, to be paid in either money or negroes at their value.

“‘To my daughter Isabella Turner I give and bequeath one thousand dollars, to be paid in either money or negroes at their value.

“‘To my son William I give and bequeath two thousand dollars; the property above mentioned is not to be removed until the first day of January next, (1820.)

“‘Negroes Lewis, Jane, Buck, Daniel, Job, Murphey, and a negro man named Prime to be divided according to valuation between Elizabeth Hughes, Isabella Turner and my son William to answer to the amount above bequeathed.’

“All the other legacies in the will were specific, except one of \$500 to the widow.

“The executor assented to these legacies, also as specific, and delivered the negroes to the three legatees, between whom they were divided according to the proportions fixed.

“Had the construction depended upon the isolated clauses

Columbia, May, 1832.

the legacies must have been held pecuniary, and that the executors had the option to pay the money or deliver the negroes. But taking all the clauses in connection, it is impossible, it seems to me, to construe them, and especially the last, in any other way than as specific. There seems to have been a clear and manifest intention to appropriate the negroes named, and no other negroes, as property to the three legatees. Those negroes were "to be divided between them to answer the amounts above bequeathed." The executors could not have refused to deliver the negroes specified; if they had died the legacy was gone, for no other funds were provided for the payment of it, all the other property having been specifically bequeathed.

"I thought therefore that the legacy to Elizabeth Hughes, as well as those to Mrs. Turner and William Hughes, was specific and so ruled. The plaintiff recovered accordingly, allowing the abatement claimed by the defendant."

The plaintiff appealed on the ground:

Because the presiding Judge decided and so directed the jury that the legacy to Elizabeth Hughes was a specific legacy, when in fact it was a general or pecuniary legacy.

Buchanan, for appellant.

McCall, contra.

The opinion of the Court was delivered by

JOHNSON, J. The question is, whether the legacy of one thousand dollars to Elizabeth Hughes, is a general pecuniary legacy of so much money, or whether it is specific of the negroes directed to be divided between herself, Isabella Turner and William Bell, in payment of their legacies. This question, like all others arising upon the construction of a will, must be

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resolved by the intention of the testator, to be collected from the will itself; and if we take that as our guide, there will be but little difficulty in arriving at a correct conclusion, without the aid of technical rules. In the direct bequest, the legacy is confessedly general and pecuniary, and it must strike the mind at once as very extraordinary, that the testator should intend to substitute a specific thing (the negroes) in its place, when a direct bequest of the negroes would have superseded it altogether. But when in the clause, directing the division of the negroes amongst them, he directs that they shall be divided according to valuation, *to answer the amount above bequeathed* to these legatees, can there be any rational doubt that he intended to set apart these negroes as a fund for the payment of these legacies, and not to give the negroes directly? I doubt whether our language furnishes terms which would more clearly express the idea. But Courts, in cases of doubt, incline against construing legacies as specific. In *Potter vs. Kerby*, 4 Ves., 572, it is said to be a rule of construction, that no legacy is to be held specific unless it is *demonstrable* that it was so intended; and if I have not already demonstrated that this legacy is general and not specific it is at least self-evident that the converse is not demonstrated. The very learned, full, and well digested written argument furnished by the counsel in support of the motion, has opened a very wide field on the subject; but I cannot persuade myself that it is necessary to follow him in all its ramifications; for it does not appear to me that the case admits of any doubt. Motion granted.

HARPER, and O'NEALL, JJ., concurred.

Motion granted.

Columbia, May, 1832.

JOHN STOCKDALE vs. MARY LEE.

A deed will not be presumed, *juris et de jure*, without proof of twenty years' possession.

Facts showing the existence, loss and contents of a deed, may authorise the presumption without the proof of possession.

In the absence of such proof, a long possession, but short of twenty years, accompanied by possession of the grant and other muniments of title, may create a presumption of the deed.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

"This was an action of trespass to try titles. The plaintiff claimed under a grant to Geo. Evans for three thousand acres, from whom he deduced a regular title to himself. The defendant claimed under John Rutledge, in whom he attempted to establish a title by proof of an uninterrupted possession, as he alleged, of sufficient duration, when taken in connection with other circumstances, to authorize the jury to presume a deed of conveyance from Evans to Rutledge, for defendant also claimed under the grant to Evans. The proof of possession was to the following effect : One Alexander Johnson, about four years after the revolution, resurveyed the land for John Rutledge. He had the grant, called it Evans' grant, and generally, after that, it was called Rutledge's land in the neighborhood. Francis Lee and Wm. Lockwood were living on it at that time, and Lee agreed to pay something for rent, as an acknowledgment of tenancy, to Johnson for Rutledge. He stayed there *three, four or five* years after, before he moved off. He then sold his improvement to Basil Meek, who remained two years, and talked of buying from Rutledge, but he was not informed that Lee was tenant, nor did he pay rent. After two

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years Lee purchased Meek's improvement again, and returned and died there. His son, John Childers, who lived with him, continued there after his death for two years. They were not in possession under any agreement to pay rent after they purchased from Meek, but Minor Winn, as the agent of Rutledge, demanded rent of him for five years, which Childers paid. Childers sold his improvement to Thomas Lockwood for a big coat, and did not inform him of his tenancy.

"Thomas Lockwood was the son of William Lockwood, who made the same acknowledgment of non-claim to Johnson that Lee did. He died there, and Thomas succeeded him in the possession, but he never became the tenant of Rutledge. He remained on the land and bought Childer's possession, to which he removed, and remained there till Hugh Yongue purchased seven hundred acres from Rutledge in January, 1799. He then procured land from Yongue and went on it, and sold his claim to Childer's place to Yongue, who cultivated it one year at least. Yongue gave him a few gallons of whiskey for his possession at Childer's place.

"Some other facts were proved in relation to the title of Rutledge, unconnected with possession.

"Andrew McDowell, being asked (by commission) if he saw a deed of conveyance from George Evans to John Rutledge, answers that "I did, at the time Rutledge made the deed to Yongue; I saw it but once; George Evans' signature was to the deed, but don't know the handwriting." Was requested to resurvey the land by John Rutledge for Hugh Yongue. Rutledge gave him the original grant for three thousand acres to make the resurvey for Yongue of seven hundred acres.

"Patrick Duncan and James Nicholson proved that Mr. Rutledge, in the latter part of his life, was partially deranged and unfit for business.

"Dr. Charles Rutledge proves also, that his father, Mr. Rutledge, in 1799, was insane, and thinks he was in the habit of burning his papers.

Columbia, May, 1832.

“Minor Winn, had the land resurveyed for John Rutledge under a power of attorney, and took acknowledgments of tenancy. He had the original grant, and he believes also, the deed from Evans to Rutledge. Oliver Cromwell and Esther Evans were the subscribing witnesses.

“This whole title has been several times before the Court of Appeals. The case of *Stockdale vs. Jonathan Yongue*, was tried before me last Spring, and the evidence of possession was then much stronger than now. I had then before me the opinion of the Court of Appeals, and charged the jury precisely in conformity to it. The plaintiff recovered then and the verdict was sustained. I did not think the jury were authorized from the possession proved on the last trial to presume the deed from Evans. At the utmost it began three or four years after the revolution, say in 1787, and continued till 1799, or 1800. It was neither long nor uninterrupted, for there was an interval of two years during Meek’s possession; and in fact none of it was of that clear, open, notorious and unequivocal character, which is necessary to raise the presumption of a conveyance. The acts of ownership by Rutledge, were relied on as aiding the proof of possession, and no doubt they may be brought in for such a purpose. But I apprehend no case can be found where a deed has been presumed on such possession.

“The recovery in the case of the present plaintiff, *John Stockdale vs. Jonathan Yongue*, was given in evidence to sustain plaintiff’s right. It was admitted by the defendant’s counsel that the present defendant claimed under Hugh Yongue, whose tenant she was, that Jonathan Yongue, the defendant in the former suit, claimed also under Hugh Yongue, that the actions were both for the same land, and that the same title was involved throughout.

“Since the commencement of this suit, Jonathan Yongue has acquired a title to the land in dispute under a levy and sale by the sheriff, as the property of the plaintiff. The title

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to the land is therefore out of the plaintiff. He recovered on the former trial damages up to the time of the sheriff's sale.

"The recovery could not be pleaded by the plaintiff or was not put on the record. I could not therefore prevent the defendant from going into his title; but as evidence in support of the plaintiff's right, I charged the jury that it was entitled to the greatest weight, and perhaps was conclusive.

"The jury found for the plaintiff damages to the time of the sale by the sheriff."

The defendant appealed, and now moved for a new trial, on the ground :

Because the Court charged the jury, that to authorize a presumption of a conveyance from one person to another, twenty years possession of the land was indispensably necessary; and that such was the opinion of the Court of Appeals, delivered in the case of the *Plaintiff vs. Jonathan Yongue*.

Clarke, for appellant.

Thomson, contra.

The opinion of the Court was delivered by

HARPER, J. This was a case proper for the determination of the jury; nor do we perceive any error in that or the charge of the Judge, which will authorize us to grant a new trial on the ground upon which it is prayed. The Judge states in his report, "that the case of *Stockdale vs. Jonathan Yongue*, was tried before me the last Spring, and the evidence of possession was then much stronger than now. I had then before me, the opinion of the Court of Appeals, and charged the jury precisely in conformity to it." The Judge adds, that on the present trial he "did not think the jury were authorized, from the possession proved, to presume the deed from Evans," and

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gives the reasons of his opinion, in which we see nothing exceptionable. It was proper that he should express an opinion to the jury. We have reviewed the former opinion of this Court, delivered by Mr. Justice Colcock, and do not perceive that it contains anything to which we are not now disposed to consent. He says, "There are two kinds of presumption; the one may be called a legal presumption; the other a presumption of fact." As an instance of the first, which is said to be unconnected with actual belief, he puts the presumption of a deed or grant from an actual possession of twenty years. With respect to the presumption of fact, the Judge says, "when the party undertakes to show that in point of fact a deed did exist, there he must first prove such circumstances, as will induce the belief of its existence; next, the loss or destruction; and lastly, the contents." He afterwards objects to the proof in the case before him, because the witness, "who testifies to having seen the deed, spoke of the subscribing witnesses, persons who were known to have lived in this State, the sister of the grantor, and Mr. Oliver Cromwell; and no account is given of them, nor any evidence to satisfy the mind whether they be dead or alive." I do not perceive what exception can be taken to this. To raise a presumption of fact, is to prove the fact, so as to satisfy the jury of its existence; not indeed by the direct testimony of witnesses who knew the fact, but by circumstances. If the highest testimony cannot be procured, then direct and positive secondary evidence should be offered, if it can be had; as in the case of a lost deed, the testimony of the subscribing witnesses who saw it executed and knew its contents. If direct and positive secondary evidence cannot be had; as if the subscribing witnesses be dead, and no copy of the deed be in existence, then circumstances may be resorted to, as that the party claiming has been long in possession; that he is in possession of the original grant and other muniments of title; and that, as in this case, a witness saw in his possession a deed purporting to be signed by the supposed grantor. But if the

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subscribing witnesses be alive, and their testimony procurable, certainly it ought to be produced ; and this is what I understand to have been said by Judge Colcock in the opinion referred to.

The motion is refused.

JOHNSON and O'NEALL, JJ., concurred.

Motion refused.

Columbia, May, 1832.

DORCAS HALL vs. THOMAS HALL, ET AL., EX'RS.

Parol evidence is inadmissible to show, that a provision in the will for the widow was intended to be in lieu and bar of dower.

Testator bequeathed to his wife certain articles of personalty and "all the rest of the property she brought when I married her;" and he directed that "the rest of my property, real and personal, be sold and equally divided between my four children:"—*Held*, that the provision for the wife was not in lieu of dower.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

"This was a suit brought for dower by the plaintiff as widow of John Hall, the defendant's testator. The marriage seizin and death of her husband were admitted. The defence relied on was, that a provision had been made by the testator for the widow in lieu of dower, which she had accepted, and this was pleaded in bar. The clause of the will is in these words: 'I give and bequeath to my beloved wife, Dorcas, one negro girl named Eliza, two beds and furniture, and all the rest of the property she brought when I married her; also, her share of money coming from the estate of William Glad-din, dec'd, and three hundred dollars to be paid by my executors. It is my will that the rest of my property, real and personal, be sold, and equally divided between my four children.'" On the construction of the will itself I held that the provision made for the plaintiff was not in lieu of dower, and that it did not sustain the plea in bar. It was admitted that she had accepted the provision, and that the property is in her possession. Parol evidence was then offered to show that the legacy was intended to bar the plaintiff's claim of dower, and that it was accepted by her with the knowledge of such intention. After argument, although I entertained doubts, I

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admitted the evidence; and John Hall, Sen'r, one of the subscribing witnesses, deposed, that when the will was in the act of being written, the wife, now plaintiff, was called on and consulted. Two modes of providing for her were suggested by the deceased: one was to give her an equal share with the children; the other to make the provision afterwards inserted in the will. She said if her husband would give her that property which is now specified in the will, she would be satisfied, and would never try to get one cent more from the children, and she would give her bond to that effect. The clause was accordingly inserted in the will as it now stands. A codicil was afterwards added giving her something more, He does not remember that the word dower was expressly mentioned, but the discussion was concerning the whole estate, real and personal, and what portion of the whole should be provided for her. The testator lived six or seven months after the execution of the will, but accumulated no property of value. He made a small crop of cotton, and four negroes that had run away, were brought in before his death. They were spoken of at the time, and it was stated that if they came in, the child's part would be more valuable. She preferred the other provision. The cause went to the jury on that evidence, not as affording proof of any agreement on the part of the wife that could be binding on her, for perhaps she was incompetent to make any such, but as shewing the intention of the testator in making the provision under consideration. And I submitted the question to the jury whether the testator intended the provision made in the will to be in lieu and bar of dower, and whether it had been accepted afterwards by her with a knowledge of such intention? And they were instructed that if they were satisfied from the evidence that such was the intention of the testator, and she knew it when she accepted the property bequeathed her; that then she had made her election, and she ought to be bound by it; and they should find for the defendant, otherwise for the

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plaintiff or demandant. The jury found for the defendants, and I thought they were warranted in their verdict by the evidence.

The plaintiff appealed on the grounds :

1. Because the Circuit Court erred in permitting parol evidence to show that the testator made provision in his will for demandant in lieu or bar of dower, or that she accepted the same in lieu or bar of dower.

2. Because the Court erred in charging the jury that they might infer from the facts testified to by John Hall, Senr., that the provision of the will was made in lieu or bar of dower, and that demandant agreed to receive the same in bar or lieu of dower.

3. Because the verdict was contrary to law and evidence.

Pearson and Nott, for appellant.

Clarke and McDowell, contra.

The opinion of the Court was delivered by

O'NEALL, J. The Circuit Court permitted parol evidence to be given, to show, that the provision in the will for the widow of the testator, was intended to be in lieu and in bar of dower, and the question first necessary to be decided, is, whether that evidence was admissible?

The general rule seems to be very clear "that parol evidence is not admissible to show the intention of the testator against the construction upon the face of the will." *Cambridge vs. Rous*, 8 Ves. 22. The intention of the testator is to be collected from the whole will, and the words which he has used. It may be that in some cases, it is necessary to

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look out of the will, and take the words used in reference to his situation or property, to obtain their true meaning. But beyond this, construction cannot be aided by parol.

In *Lawrence vs. Dodwell*, 1 Lord Raymond, 488, the plea was that the testator devised his land in A. to his widow for life, and that she had entered upon it: and it was averred that it was devised to her in satisfaction of dower: judgment was given for the demandant, "because the averment being of matter out of the will, and not contained in it, ought not to be allowed."

If the averment of the fact in the plea was bad, it follows that evidence to prove it must be necessarily inadmissible.

In *Ambler and wife vs. Norton*, 4 Henning & Munford, 28, it was held that any estate conveyed by deed or will for a wife's jointure in lieu of dower, *though not so expressed*, may be averred to have been so intended, and parol or other evidence dehors the deed or will is admissible, *as to the relative situation of the parties, and circumstances of the testator*, from which such intention may be inferred. That decision, however, was predicated upon the Act of the Legislature of Virginia, wherein it is enacted, "That if any estate be conveyed by deed or will, either *expressly or by averment*, for the jointure of the wife in lieu of dower, to take effect, and continue as in the Act is expressed, such conveyance shall bar her dower," &c. It would be a sufficient answer to the authority of this case to say, that we have no such statutory regulation in this State. But on looking into the case, it will be seen that Judge Tucker maintains, and I think most successfully, that a mere devise of lands, slaves, and money, cannot be averred, even under the statute of Virginia, to be a satisfaction of the widow's dower, for the reason that no evidence out of the will can be admitted to shew that it was so intended. Judges Roane and Fleming admit the English rule to be as stated by Judge Tucker, and rest their decision upon the construction of the Act of Virginia, and therefore sustained the

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plea which averred the devise to have been in satisfaction of the demandant's dower. That case, however, would not sustain the admissibility of the evidence in this case; it only goes to establish the rule that parol evidence *dehors* the deed or will is admissible, as to the relative situation of the parties, and circumstances of the testator; and to this extent I should be willing to admit the soundness of the rule. As an illustration of my view of it, I put the following case: if a testator owns but one tract of land, and he devises to his wife an estate for life, in one-half of it, and she claims her dower in the other half, then I apprehend that it might be shown by parol that he owned no other land, and that consequently the estate devised to her, being out of the very land of which she was dowable, and more than her dower, was a satisfaction. The evidence in this case was of conversations between the testator and his wife at the time the will was prepared, and were clearly inadmissible as "parol discourses out of the will, which are of no signification," "for it must be entirely in writing."

We concur in opinion with the presiding Judge upon the next question, that upon a construction of the will itself, the bequest to the widow is not in lieu of her dower; there is nothing in the will which declares it to be in lieu and in bar of her dower; and unless it had been so expressed, or was necessarily to be implied from the nature of the estate devised, or the situation of the parties, we cannot hold that she is barred. *Couch vs. Stratton*, 4 Ves. 391.

The motion for a new trial is granted.

JOHNSON and HARPER, JJ., concurred.

Motion granted.

Treasurers *vs.* Hilliard.

THE TREASURERS OF SOUTH CAROLINA, FOR THE STATE, D.
& J. EVART, AND BOYCE & HENRY *vs.* THE SURETIES OF
WILLIAM HILLIARD, LATE SHERIFF OF RICHLAND DISTRICT.

The sheriff failing to return tax executions within the time limited by law, his sureties cannot show in their defence to an action brought on his bond, the insolvency of the defendants in the executions, inasmuch as the Act of the Legislature makes him liable for the amount of the executions for not returning the same within the time allowed.

The sheriff's sureties cannot show in their defence that the State was indebted to the sheriff.

The sheriff's sureties are not liable for the *penalties* imposed by Acts of the Legislature for not returning executions, and not paying over within ten days after demand. *(a)*

In a suit against the sureties for not returning executions in civil cases, it being a mere question as to the amount of damages sustained by plaintiffs, evidence of the insolvency of the defendants in execution may be given.

BEFORE GANTT, J., AT RICHLAND, SPRING TERM, 1832.

Judgment had been recovered for the amount of the penalty of the Sheriff's bond. In behalf of the State it was suggested that sundry tax executions lodged with the sheriff he had failed to return; and it was claimed that damages should be assessed to the amount of those executions. His Honor held that the defendants could not show, in their defence, the insolvency of the defendants in execution, and further that they could not show that the State was indebted to their principal and claim the amount as a discount. In behalf of the sureties an appeal was taken.

D. & J. Ewart suggested that sundry executions in their favor had not been returned according to law; and they

(a) The sureties are now liable. See Act 1846, 11 Stat. 358.

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claimed the penalty imposed by the Acts of 1799 and 1827 for not returning executions. His Honor held that the sureties were not liable for the penalty: that they were liable only for the damages the plaintiffs had sustained; and that it might be shown in the defence that the defendants in execution were insolvent; and such evidence was given. D. & J. Ewart appealed.

Boyce and Henry suggested that the sheriff had neglected to pay over, within ten days after demand, a large sum of money which he had collected for them; and they claimed the penalty of fifty per cent. imposed by the Act of 1796 for such neglect. His Honor held that the sureties were not liable; and Boyce and Henry appealed.

Preston, for the sureties.

Gregg, for D. & J. Ewart and Boyce and Henry.

The opinion of the Court was delivered by

O'NEALL, J. The decision of the Judge below, in refusing to allow the defendants to give evidence of the insolvency of persons against whom the tax-collector of Richland District had issued executions and lodged them with the sheriff, and which he had failed to return within the time allowed by law, and also in refusing to allow the defendants to show that the State was indebted to the sheriff for various services, and to set the same off against his liability for tax executions, was correct. The same points were ruled and settled by this Court at our last session in Charleston, in the case of the *Treasurers vs. Cleary*, (3 Rich. 372.)

We concur with the Judge below, that the defendants were not liable for penalties imposed on the sheriff by the Acts of 1796, 1799, 1827, for not paying over to the plaintiffs in execution money by him collected under it, and for not returning

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executions according to law. The undertaking of the securities is, that the sheriff shall discharge the duties of his office: his failure to pay over money collected by him, or to return the executions in his office, according to law, are violations of his duty, and consequently breaches of the covenant contained in the condition of his official bond; and the securities become thereby liable to respond in damages to the parties interested. But penalties imposed on the sheriff for a violation of his duties, are not damages sustained by the parties affected by his default. They are punishments inflicted by the law on the sheriff himself for a *quasi* criminal neglect of duty. If the penalties were in the nature of liquidated damages, it is possible the securities might be liable, but there is nothing in the Acts which authorizes us so to regard them.

We are also of opinion, that the presiding Judge was correct in allowing evidence of the insolvency of the defendants, in the executions of D. & J. Ewart, which the sheriff had failed to return according to law. After he had decided that the securities were not liable to the penalties imposed by the law on the sheriff for not returning the executions, the question still remained to be decided, what damages did the plaintiffs in execution sustain, by the sheriff's failure to make the returns? There is this difference between this question and that which was made under the tax executions: in the latter the law has made the sheriff, if he fails to make his return within the time limited by law, liable for the amount of the tax executions; in the case of executions at the suit of citizens there is no such legal provision. It is then in such a case a question of how much actual damage has been sustained by the party, by the executions not being returned. The legal presumption arising from no return being made, is that the sheriff has either received the debt or he might have done so. Anything which goes to rebut this legal presumption is competent evidence for the defendants. The insolvency of the defendants in the execution not only rebuts and destroys the legal presumption, but

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also shows that the plaintiffs in execution can have sustained no damage from the default of the sheriff. The analogous case of *Boyce vs. Barksdale*, 4 McC., 141, seems to me to be decisive on this point.

The various motions for a new trial are dismissed.

JOHNSON and HARPER, JJ., concurred.

Motions dismissed.

Rice vs. Sims and Worthy.

JOHN S. RICE vs. SIMS & WORTHY.

A contract, if defendants would hire from plaintiff two negroes as boat hands, plaintiff would deliver to them his cotton crop to be carried to market, is not *nudum pactum*: it is promise for promise.

A discount predicted of the breach of this contract, pleaded to an action for the hire of the negroes, is not barred if filed within four years after demand of performance.

The statute of limitations ought not to be formally pleaded to a notice of discount. It may be objected *ors tenuis* on the trial.

If formally pleaded, it, with the replication, may be treated as surplusage, and will not injure either party.

A plea of *non assumpsit infra*, &c., to an executory contract, is bad.

A party may claim interest from a time anterior to the accrual of the cause of action.

The damages found by the jury depending upon the facts, the Court would not interfere.

BEFORE EVANS, J., AT CHESTER, FALL TERM, 1831.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of assumpsit for the hire of two negroes. The defence was a discount for damages sustained by the plaintiff's not keeping his promise to employ the defendants to freight his cotton at two dollars and fifty cents per bale. This discount was objected to as barred by the statute of limitations. The agreement for the hire of the negroes and the freight of the cotton, though not dependant stipulations, were simultaneous. Worthy, one of the defendants, said he had hired the negroes because he was to carry the cotton, and he would not but for this, have given so much. Both contracts were satisfactorily proved. Rice sold his cotton, sixty or seventy bales, in January or February. In April, 1824, Worthy applied to Rice for the cotton, but he said he had sold it. The notice of

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discount was given 29th March, 1828. It was proved that in the winter the defendants' boats were idle from four to six weeks for want of freight. In the spring they were again idle, and the hands had to work in the field, and the patroon rode over the country hunting for freight. Boats usually consumed four weeks in going to Charleston. Four hands were necessary to a boat to Columbia, and three from thence to Charleston. Boats carried from thirty to forty bales to Columbia, and double that quantity thence.

"I charged the jury that the plaintiff was clearly entitled to the hire of two negroes from November to March, at the rate of sixteen dollars each; and that the defendants were as clearly entitled to set off against this, and to a verdict for the balance, if any, the damages which they sustained by reason of not getting the cotton on freight. I was of opinion, and so charged the jury, that the plaintiff's contract about the freight of his cotton, was not *nudum pactum*, as was contended, but founded on a sufficient consideration, viz.: the undertaking of defendants to carry the cotton and deliver it safely. It was promise for promise, and each could maintain an action for the non performance of the other. I also charged the jury that the defendants could not maintain an action, or set off their discount, without proof that they were ready and offered to freight the cotton. That no action accrued to them until they had offered to perform, which was in April, 1824, and as the notice of discount was given within less than four years from that time the discount was not barred by the statute of limitations. The jury found a verdict for defendants, allowing, as is said in the notice of appeal, the full amount of the freight of the cotton."

The plaintiff appealed on the grounds:

1. Because even admitting the plaintiff's contract to let the defendants have his cotton to boat to Charleston on freight, it was a contract without consideration, and not legally binding upon him.

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2. Because the jury allowed defendants the full amount of the freight of sixty-five bales of cotton at two dollars and fifty cents, as the damages sustained by them by the breach of plaintiff's contract, when it was manifest they could not have sustained any such damages, as the freight of the cotton, taking into consideration the expenses of transportation, could have yielded no such profit.

3. Because the defendants entirely failed to prove they sustained any damages in consequence of not getting plaintiff's cotton to boat to Charleston, or that their boats were unemployed after they made a demand of the cotton during the balance of the boating season.

4. Because the Court misdirected the jury upon the nature of plaintiff's agreement, in stating to them that the contract on the part of defendants to hire plaintiff's negroes, formed a sufficient consideration to make his contract valid.

5. Because the discount of defendants offered in evidence on the trial of the case, was barred by the statute of limitations, as the damages proved to have been sustained by them in consequence of a supposed breach of plaintiff's contract, was in February, 1824, and the discount was not served on plaintiff until after the 29th of March, 1828, making more than four years from the accruing of the damages to the filing of the discount.

6. Because it was manifest from the face of defendants' discount, that the same was barred by the statute of limitations.

7. Because if the alleged agreement on the part of the plaintiff was rendered valid by the contract of defendants to him for his negroes, the contract was put an end to by the defendants on the 18th March, 1824, the time they returned to plaintiff his negroes and more than four years elapsed between the returning of the negroes and filing the discount of defendants, and therefore it was barred by the statute of limitations.

8. Because the Court misdirected the jury in stating to

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them that defendants' cause of action did not accrue till April, 1824, at the time they made a demand of the cotton of the plaintiff, and he refused to deliver it to them.

9. Because the verdict was contrary to the evidence and the justice of the case, and contrary to the opinion of the presiding Judge as to the amount of damages sustained by defendants.

Herndon, for appellant.

Williams, Thomson, contra.

The opinion of the Court was delivered by

O'NEALL, J. The grounds taken for a new trial in this case, may be resolved into the three following, viz.: 1st. That the plaintiff's contract with the defendants was *nudum pactum*. 2d. That the defendants discount was barred by the statute of limitations. 3d. That the damages found for the defendants are excessive.

1st. To the first ground it is sufficient to answer, that the plaintiff's and the defendants' contracts were simultaneous; each was the inducement of the other. Promise for promise is a sufficient consideration. It has been supposed that there was no proof that the two contracts were made simultaneously; but the fact is so reported by the presiding Judge, and we must regard it as proved. It is said, however, that it appears from the report, to have been proved by incompetent testimony—the declarations of one of the defendants. If this had been so, and the plaintiff thought proper to permit the evidence to be given, without objection on the circuit, he would be precluded from making the objection here. But I have no doubt that the defendants' declarations, on which the Judge relied, were part of the proof adduced by the plaintiff to shew the defendants' contract of hiring; and if so, there could be no objection to their competency.

2d. It has been for various reasons supposed in the course of the argument, that the discount was barred by the statute of limitations. I shall proceed to examine these in the order in which

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they were stated. It was contended that under the state of the pleadings, the defendants' discount was barred. It appears that the defendants gave notice of and filed a discount on the 29th March, 1828, consisting of two items; the first is stated to be "damages for not delivering to the defendants the crop of cotton made by the plaintiff in the year 1823, to be boated to Charleston, say seventy bales, at two dollars and fifty cents per bale, as per contract, one hundred and seventy-five dollars." The second is stated to be "loss sustained by detention of boat and hands, two months, one hundred and seventy-five dollars." "Interest thereon from the 1st January, 1824, one hundred and fifty dollars." To this discount the plaintiff pleaded that he did not promise and assume within four years. The defendants replied generally that he did.

A discount is not a formal plea requiring any replication; it is merely a defence of which the party is at liberty to avail himself, by giving notice of it. To a discount the plaintiff may oppose the statute of limitations on the trial, without any previous pleading. It was therefore unnecessary that it should have been pleaded.

If the plaintiff's plea had been insufficient in form, it would not have precluded him from relying on the statute. It would have been regarded in that case as mere surplusage in the record. If a mispleading of the statute could not have prejudiced the plaintiff, the plea cannot have the effect of putting the defendants on the issue whether the contract was made within four years, instead of the time at which their cause of action accrued. The whole of the pleadings in relation to the discount from its filing are immaterial, and cannot have the effect to prejudice either party.

But put the case upon technical grounds, and the plaintiff's plea is insufficient. The defendants' discount is predicated of an executory contract, on which they had no cause of action until they had legally entitled themselves to demand of the plaintiff performance, by offering on their part to do what

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they were bound to do. To an executory contract, *non assumpsit infra quatuor annos*, is an insufficient plea, and may be set aside on demurrer, or may be struck out on motion. It is in such a case an immaterial plea, for it is not the statute of limitations, which allows to a party four years next after the cause of action given on account, within which to bring the action. The only effect of a replication to such a plea, would be to give the party pleading it, the same advantage which he would have had if he had pleaded *actio non accrevit*. The replication makes it a good plea of the statute of limitations, which it would otherwise not have been. It was argued that the effect of laying the discount with interest from the 1st of January, 1824, went to conclude the defendants from showing that their cause of action accrued subsequently. It may be that interest may accrue on a cause of action, before the party has any legal right to demand either the money stipulated to be paid, or damages for its non performance. It would therefore be no guide as to the time at which the cause of action accrued. But on giving to the discount a strict construction, it would seem that the interest claimed is confined to the last item, of which the verdict in favor of the defendants is not predicated. It is true, from the amount set down as interest, I have no doubt it was intended to cover the whole discount; but in strict grammatical construction from the words used, it applies only to the last item. If, however, it did apply to the whole discount, still it could not avail the plaintiff; for the defendants claim in the first item of their discount damages for the non-delivery of the crop of 1823, to be boated to Charleston, "as per contract." This distinctly made the question upon it to depend on the contract proved; and both their right of action, and of interest (had they been entitled to any) depended upon when it was broken by the plaintiff. This brings us to consider when did the defendants' right of action, for a breach of contract, accrue? In this respect I fully concur with the presiding Judge, that they had no right of action until they offered to

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perform the contract on their part. The plaintiff, according to his part of the contract, had the right at any time during the boating season, when his crop was gathered and ready for market, to deliver it to the defendants, to be by them carried to Charleston. Within the whole of this time they had the right to expect that he would deliver it. They were not bound to know when he sold it, and of course they were not bound then to sue him. Neither were they bound to demand the cotton, when they returned his negroes. After the press of boating during the winter and first month of spring, they might have had sufficient hands of their own, to do all the business which remained; and they were therefore then at liberty to return the plaintiff's negroes, and still expect when he had his crop ready, he would deliver it. The demand of performance to entitle the defendants to recover, must have been after the plaintiff had gathered his crop, and had it ready for market, and within the boating season. All of these requisites were complied with. The demand was made after his crop was gathered and ready for market; for he had previously sold it. It was within the boating season, which extends at least to the month of May. The demand of the cotton and the offer to carry it to Charleston, was in April, 1824, the defendants' right then accrued; and as more than four years had not intervened between it and the filing of the discount, the defendants are not barred.

8. The amount of damages sustained by the defendants was a question of fact for the jury. It may be that they have been allowed more than justice demanded; but it also may well be, that the actual damages to the defendants were greater than the sum found by the verdict. The jury were better able to decide on such a matter than we can be.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ., concurred.

Motion dismissed.

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SAMUEL EWART vs. THEODORE STARK, ADMINISTRATOR OF
JOS. MCCLINTOCK.

An innkeeper may not detain the goods of a boarder for the price of his board, though he may those of a traveller. (a)

The opinion delivered in the Court of Appeals, is as follows:

JOHNSON, J. By the common law, tavern-keepers are only bound to receive and entertain travellers as their guests; and the condition of the bond which they are required to give on obtaining a license, under the Act of 1785, 1 Brev. Dig. 419, requires that they "shall keep clean and wholesome meat and drink and lodging for *travellers*, and the usual provender for horses." By the common law, he is liable also for the goods of his guests, if they are lost; and hence, the right of the tavern-keeper to detain for the expenses of his guests, and the reasons on which the right is founded, is well summed up in *Bac. Abr. Inns and Innkeepers, D.*—"For men who get their livelihood by the entertainment of others, cannot annex such disobliging conditions that they shall retain the party's property in case of non-payment, nor make so disadvantageous and impudent a supposition, that they shall not be paid; and therefore the law annexes such a condition without the express agreement of the parties." Now it is apparent, that neither the rule, nor the reason of it applies to one who boards or sojourns at a tavern, for the keeper is not bound to receive him in that character, either by the common law, or by the terms of his bond; nor is he liable if the goods of the boarder are lost; as where an attorney hired a room in an inn for the term; or where one by special agreement boarded or sojourned in an

(a) See *Dunlap vs. Thorne*, 1 Rich. 218, and note (a), p. 219.

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inn, and was robbed; and it was held that the keeper was not liable. Bac. Abr. Inns and Innkeepers, C. 5. With respect, therefore, to a boarder or sojourner, the law imposes no obligation on the tavern-keeper to receive him, and the parties are left to make what contract they please, and consequently he cannot detain for the price of board, unless it is stipulated for.

It seems not to be well ascertained who was or was not a traveller, for whom the innkeeper was bound to provide. By the old law, it seems he was called a traveller the first day of his sojourn, a hogenhind the second day, and a menial servant on the third. But now, it seems, he will not lose that character, although he remain a week or a month at the same place; Bac. Abr. C. 5; and perhaps the only mode of ascertaining that fact, is to inquire whether he is resident or transient: that depends necessarily upon the object, nature, and extent of time which he has been resident, and must be resolved by the general understanding; and without pursuing the inquiry further, it is notorious that the defendant's intestate had been long resident here, engaged in the business of a profession which rendered a fixed residence indispensable.

We are, therefore, very clearly of opinion, that the plaintiff had no right to detain the goods of the defendant's intestate left in the room in which he died.

The motion is refused.

O'NEALL and HARPER, JJ., concurred.

Motion refused.

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CATHERINE PROCTOR *vs.* ANDREW MCCALL.

Plaintiff was the payee of a note drawn by defendant, which a third person had got possession of fraudulently and transferred to W. Notice was given to defendant not to pay the note to W., but he did pay it to him, and this action was brought for the amount of the note:—*Held*, that W. was an incompetent witness for defendant—he being liable to defendant in case of plaintiff's recovery.

BEFORE JOHNSON, J., AT LAURENS, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows:

“Plaintiff held defendant's note for the amount sued for, and married one Craig, who was proved to have had a wife alive at that time. Under the fraudulent marriage, Craig acquired possession of defendant's note, and traded it to Wm. D. Watts, and soon afterwards absconded. Plaintiff gave notice to defendant of the fraud committed on her, and forbid his paying the note to Watts or to any other. The defendant, however, did pay the note to Watts, and this action was brought to recover it from him, on the ground that he paid it with notice to one who had no right to receive it.

“The defendant offered Watts as a witness, who was rejected on the score of interest, since he will be clearly liable to defendant, if the plaintiff recovers in this action.

“I charged the jury that Craig had acquired by his fraudulent marriage no title to the note, and therefore the principal question was whether Watts had notice of that fraud before he purchased the note from Craig. If he had notice, the plaintiff was entitled to a verdict, because the defendant under the circumstances of this case could be in no better situation than Watts, if he had paid it wrongfully to Watts, after notice, that pay-

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ment was no protection. They found a verdict for the plaintiff, and, as I thought, very properly."

The defendant appealed, and now moved for a new trial on the following ground :

That the Court erred in rejecting the testimony of William D. Watts, who was a competent witness.

The opinion of the Court was delivered by

JOHNSON, J. Whether Watts was or was not a competent witness for the defendant, depends entirely on the question, whether he (Watts) was liable over to the defendant in the event of the plaintiff's recovery against him.

For the defendant it is alleged, that he paid the money to Watts with a full knowledge of all the circumstances, and it is insisted therefore that in law he is not entitled to recover it back, whether the plaintiff recovers against him or not. But this case is not supported by the evidence. The plaintiff and Watts both claimed the money from the defendant, and it is true that the plaintiff informed him correctly as to the facts on which her claim was founded, but it does not appear whether Watts was or was not equally candid in the exhibition of his claim: for anything that appears, he might have denied every fact stated by the plaintiff, or stated other matters equally opposed to her right to receive, and thus have left the defendant in ignorance as to the true state of the facts, and assuming for the present, that the rule contended for by the defendant is correct, it has no application. All that we can deduce from the evidence is that the defendant paid to Watts money which the plaintiff was entitled to receive, and *prima facie*, it was done by mistake; for he will not be presumed to have intended to give away his money, and according to the *ex equo et bono* principle, he would be entitled to recover it back. The allega-

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tion that he paid it with a full knowledge of all the circumstances must come from the party receiving, and from him the proof also must come.

I am not satisfied, however, that if the case assumed by the defendant in reality existed, and that he was fully aware of all the facts and circumstances on which the claims of both the plaintiff and Watts were founded, that he would not be entitled to recover it back from Watts.

I concede freely, that money voluntarily paid, with a knowledge, or the means of knowing all the circumstances on which the claim is founded, cannot in general be recovered back, and that the payer is not helped by his ignorance of the law; and these are the rules laid down in *Lowrie vs. Bourdieu*, Doug. 468, and *Bilbie vs. Lumley*, 3 East, 471. These cases proceed upon the principle, that a man may give away his money if he will, and he is bound by it: *volenti non fit injuria*, says Lawrence, J., in *Chatfield vs. Paxton*, 2 East. 471, note a, Day's ed. He may buy his peace; there may exist a moral obligation which the law will not enforce, as in *Morris vs. Tarin*, 1 Dal. 147, and if he pay his money for these, or any other like considerations, he cannot recover it back. But in *Lawrence vs. Beaubien*, (2 Bail. 623,) decided in this Court after great deliberation, a distinction was taken between ignorance and a mistake in law, and it was held that a party was not bound by a contract entered into under a mistake of the law; and the proof there was, that he was led into the mistake by the advice of counsel learned in the law: and I apprehend that when full proof of like mistake can be made out by other means, the same rule will obtain. What is the case here as assumed by the defendant? He certainly did not intend to give Watts the money. He could not have intended to buy his peace; for the payment to Watts exposed him to an action at the suit of the plaintiff. He was under no obligation to Watts, but what arose out of his possession of the note. He could, therefore, have had no other inducement to pay the money to him, but the honest

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belief that he was legally bound to pay; and thus I think the proof of a mistake in law is clearly made.

There is another view of this question, which appears to me worthy of consideration, and which I am induced to throw out, that it may meet the eye of the profession. In all the cases in which it has been held that money voluntary paid could not be recovered back, the payment has operated to discharge the payer from a real or supposed obligation. But here the very same obligation is found to be due to a third person, and I think it may be well questioned, whether recovery against him by that third person does not raise an obligation on the receiver to refund it.

Motion dismissed.

HARPER, J., concurred.

O'NEALL, J., had been of counsel, and gave no opinion.

Motion dismissed.

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JAMES RAGSDALE vs. WILLIAM ESTIS, ET AL.

A lessee, who has parted with the whole term, cannot distrain on his sub-lessee.

BEFORE EABLE, J., AT CHESTER, SPRING TERM, 1832.

This was an action of trespass for taking the goods and chattels of plaintiff. Defendants justified under a distress warrant, for rent in arrear. Estis, one of the defendants, had leased the premises to John Ragsdale, ending the 1st January, 1832, for forty dollars, and had his note payable accordingly. John Ragsdale conveyed his lease to plaintiff for the same term, for forty dollars, and had his note expressed to be for rent dated — day of February, 1831, due 21st February, 1831. On the 29th November, 1831, John Ragsdale issued his distress warrant and distrained a colt, some cotton standing in the field, some picked out, and some corn and fodder. The proceedings were regular, if John Ragsdale had the legal right to proceed in this way. The property was sold, and the money going to Estis, the original landlord, was paid over to him: he was present and was directing. Mayfield, the other defendant, was the constable. Plaintiff proved that John Ragsdale had previously received the colt, and said he had got it for rent. The colt was worth fifteen or twenty dollars. The Court decreed for plaintiff, on the ground that John Ragsdale had no legal right to issue his distress warrant, and that the colt was in payment of rent.

Defendants appealed on the grounds

1. That as plaintiff's goods were legally sold, under a distress warrant, defendants were not trespassers, and therefore the decree should have been for defendants.

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2. If the colt spoken of was in payment, it was only for about fifteen or twenty dollars, which left a balance for which defendants might distrain and sell.

Williams, for appellant.

Thomson, contra.

The opinion of the Court was delivered by

JOHNSON, J. The rule very clearly is that a lessee cannot distrain upon his sub-lessee for rent in arrear; and the technical reasons seem to be, the want of privity of estate between them—the right of distress being inseparable from the reversion. *Prescote vs. De Forest*, 16 Johnson, 159. But a more practical reason will be found in the circumstance, that if allowed, the landlord might be deprived of the means of distress. If the lessee may distrain, so may the sub-lessee on his lessee, and so on, *ad infinitum*, and thus the tenant in possession be subjected to infinite distress.

Motion dismissed.

O'NEALL and HARPER, JJ., concurred.

Motion dismissed.

Columbia, May, 1832.

SAMUEL E. GREGG *vs.* WILLIAM VAUSE.

Variance between the proof and the bill of particulars no ground for nonsuit.
The objection should be to the evidence when offered.

BEFORE RICHARDSON, J., AT DARLINGTON, SPRING
TERM, 1832.

SUM. PRO. on open account. Defendant moved for a nonsuit, which his Honor refused. The decree was for the plaintiff, and the defendant appealed.

Dargan, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. The variance between the proof and the process, complained of in this case, is properly a variance between the proof and the bill of particulars endorsed on the process. The general allegation in the process is, that the defendant is indebted to the plaintiff "in the sum of seventy dollars due on open account, a copy of which is endorsed." The account endorsed, is, "1829, To rent of plantation one year, thirty dollars:—five thousand rails, to have been placed on the same, twenty dollars:—repairing, fencing, &c., twenty dollars:—seventy dollars." The proof was, that the account accrued in 1830, and was due 1st January, 1831. The presiding Judge held that the variance between the proof and the bill of particulars, was unimportant, and decreed for the plaintiff. In this conclusion, I think the Circuit Judge was correct. The office of the bill of particulars is, to confine a general count to the proof of some specific demand. It is, in other words, notice to the defendant to what matters the plaintiff's proof will

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be directed. If proof differing from the bill of particulars in some slight circumstances, such as the time when an account accrued or is due, and not in the general nature and character of the demand described in it, is offered and received without objection from the defendant, he cannot afterwards object to a recovery against him, on account of a variance between the *allegata et probata*; for the general allegation and the proof does correspond. The party is indebted at the time the action is brought, by open account. The variance is between the bill of particulars or notice of the proof to be given and that received. The objection is to the admissibility of the evidence on the ground of surprise in that the party is notified that proof of indebtedness at one time will be given in evidence, and the proof offered, is of indebtedness at another time.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ., concurred.

Motion dismissed.

Columbia, May, 1832.

W. B. ARNOLD *vs.* T. W. WATERS.

On a note past due, the payee, in the spring of 1827, made the following endorsement: "I endorse the within note for value received, on condition the holder first tries the within N.; if the money cannot be had before Christmas, then I hold myself responsible for the money to the holder." N. was sued by the holder, and judgment recovered against him at Fall Term, 1827. *Fi. fa.* was issued and returned *nulla bona*. In an action against the endorser, *held*, that it was not necessary to show that a *ca. sa.* had been issued, and that the holder had failed to make the money under it.

Under such a contract it is not necessary to prove the insolvency of the maker.

Insolvency may be established by other evidence than a *ca. sa.* under which the debtor was discharged. A return of *nulla bona*, and general reputation of insolvency, is, in general, sufficient *prima facie* evidence of it.

BEFORE EARLE, J., AT SPARTANBURGH, SPRING TERM,
1832.

The report of his Honor, the presiding Judge, is as follows:

"The defendant held the note of Joseph Nix in the following words:

"By the 25th of December next, I promise to pay T. W. Waters, or bearer, twenty-five dollars for value received. April 1st, 1826.

JOSEPH NIX.

"In the spring of 1827 the defendant endorsed the note to plaintiff in the following words—"I endorse the within note for value received on condition the holder first tries the within named Nix; if the money cannot be had before Christmas, then I hold myself responsible for the money to the holder.

"T. W. WATERS.

"The plaintiff brought suit against Nix to Fall Term, 1827, when judgment was obtained and execution lodged in the sheriff's office the 24th October, 1827. It was returned *nulla*

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bona. No further proceedings were had on the judgment against Nix, and this action was brought against Waters on the 24th December, 1831. Nix was a settled resident of Union District (where he was sued) during 1827, 1828, and until 1829, and carried on a farm. A motion being made for a nonsuit, the plaintiff offered to prove that Nix was insolvent. The Court, without deciding that the evidence was inadmissible or excluding it on that ground, replied that testimony of that kind could not be more conclusive or satisfactory than the return of *nulla bona*; that it could only be allowed him to prove that Nix had been arrested, and had sworn out under the Act; and that the opinion or assertion of witnesses that he had no property, or not enough to pay his debts, for the purposes of the case I would consider as proved. I was unable to distinguish this case from that of *Eddings vs. Glascock*."

The motion for a nonsuit was granted, and the plaintiff appealed on the grounds

1. Because from the terms of the indorsement the plaintiff was not bound to issue a *ca. sa.* before proceeding against the indorser.
2. Because the return of *nulla bona* was sufficient to entitle the plaintiff to recover in this action.
3. Because the plaintiff should have been permitted to prove the insolvency of Nix by parol.

Irby, Bobo, for appellant.

Thomson, Smith, contra.

The opinion of the Court was delivered by

O'NEALL, J. This case, in the view we have taken of it, depends altogether on the terms of the special indorsement.

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The indorser stipulates that "on condition the holder first *tries Nix*, (the maker,) if the money cannot be *had* before Christmas, then I hold myself responsible for the money to the holder." This is a direct and positive engagement, to pay on the happening of certain contingencies: what were they in the meaning of the parties, according to the words which they have used? The first is to be ascertained by fixing what is meant by the words, *first tries Nix*. These words certainly mean that the indorsee should resort to the usual means of collecting the money from Nix: which in common understanding means nothing more than to sue, obtain judgment, and issue a *fi. fa.* The second contingency is, "if the money cannot be had before Christmas." The term *had*, may be as well understood to mean paid, as in any other sense: and then his liability would depend upon the fact of payment not being made under the recovery before Christmas. But if it means cannot be collected, the same result seems to me will follow. The indorsee sued to October Court, at Union, where the defendant resided, and recovered a judgment;—he issued his execution, which was returned *nulla bona*. This was trying by the usual means of process to collect the money: and upon its failure to effect the end, the defendant's liability to pay attached, according to his contract, at Christmas.

But it is said, the plaintiff should also have issued a *ca. sa.*, and forced the defendant to have taken the benefit of the insolvent debtor's or prison bound's Act. The first, it is clear, could not have been accomplished until Spring Court, after the time at which the indorser's liability was to attach.

The second might have been done barely within the time: but the debtor might have declined to take the benefit of the Prison Bound's Act, and claimed the benefit of the Insolvent Debtor's Act, and thus his insolvency could not have been established within the time fixed for the indorser's liability to arise. I am, therefore, well satisfied no such pre-requisite was contemplated by the parties.

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Under such a contract, evidence of insolvency was hardly necessary to be given; for the party to be charged did not stipulate that the maker should be pursued to insolvency. If, however, it was so stipulated, I am not prepared to hold that in all cases to establish it, it is necessary to show the issuing of a *ca. sa.*, and the discharge of the debtor, under the Insolvent Debtors' or Prison Bound's Act. It is true, such is the decision of *Eddings vs. Glascock*, 1 N. & McC. 295. But that case turned on the words of the contract on which the indorser's liability was to arise, "provided it cannot be made out of Allen Elliot." These words were held to require that the plaintiff should have exhausted the process of the Court, before the indorser's liability would attach. There was, too, in that case, no limitation of time, within which the money might be collected. This makes in my judgment a material distinction between that and this case. In *Sims vs. Hall*, decided in May Term, 1828, at this place, the defendant had guaranteed the note of James Moorman, which he had indorsed to the plaintiff; provided suit was brought to the first court, and Moorman should prove to be insolvent. Suit was accordingly brought; Moorman died and the suit abated. Administration, shortly before the trial of the case on the guaranty, was taken out on Moorman's estate. Returns of *nulla bona* on sundry executions against Moorman, and general reputation of insolvency, were held to be enough to charge the indorser, although no suit had been instituted against the administrator. Of the correctness of that decision I entertain no doubt. In many cases it would be impossible to serve a defendant with a *ca. sa.*: for between judgment and execution he may leave the State. In others it would be only saddling an unfortunate creditor with costs, to establish the fact of insolvency by the record, which is known to every one acquainted with the debtor. Generally, it seems to me, that a return of *nulla bona* and general reputation of insolvency, would be a sufficient showing to cast the

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onus of proving solvency on the indorser, who has guaranteed the ultimate payment.

The motion to set aside the nonsuit is granted.

JOHNSON and HARPER, JJ., concurred.

Motion granted.

CHARLES MATLOCK, ASSIGNER OF EXECUTOR OF LYNN, *vs.*
HENRY GIBSON.

A defence of unsoundness, to a note given for the purchase-money of negroes, proceeds on the ground, not of discount, but of failure of consideration.

In an action on a sealed instrument defendant may show that it was without consideration, or that the consideration had failed.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

“This was an action of debt on a sealed note given by the defendant payable to Jackson Lynn, deceased, dated 29th November, 1828, due the 1st November, 1829, for one hundred dollars. The defendant had purchased some negroes of Lynn, a fellow, a woman and three children. The price was one thousand one hundred and twenty-five dollars, which was all paid except one hundred dollars, for which the note was given. The defence, by way of discount, was that the woman was diseased and worthless, and the fact was established by abundant proof. The discount was objected to by plaintiff's counsel, on a legal ground arising out of the following state of facts. A man of the name of William Stubblefield had been the agent of Lynn in buying the negroes, and his assistant in selling them.

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They were both present, and a bill of sale was executed to the defendant warranting the title and the soundness of the negroes, which both of them had signed. The negroes were Lynn's alone, and not the joint property of both, and the note was given to Lynn alone for the balance of the price. Stubblefield was examined as a witness on the part of the plaintiff, and swore that he had no interest in the negroes, or in the recovery of the note; but stated his agency in the sale, as well as in the purchase of the negroes, and that being in company (indeed he seemed to think he had made the sale himself for Lynn) he had put his name also to the bill of sale. I overruled the objection to the discount, and the jury on the evidence found for the defendant."

The plaintiff appealed, and now moved for a new trial on the ground:

Because the defendant having taken the joint warranty of Jackson Lynn and William Stubblefield under seal, damages accruing from a breach of that warranty could not legally be set off, or pleaded as a discount, in an action brought by the plaintiff on a sealed note made by said defendant, and payable, not to Jackson Lynn and William Stubblefield, but to Jackson Lynn alone.

Clarke, for appellant.

Pearson, contra.

The opinion of the Court was delivered by

O'NEALL, J. The ground of appeal supposes that the defendant was allowed, to discount the damages which he had sustained, by reason of the breach of the covenant of warranty of him and Stubblefield. This, however, is a mistake. The defence of the defendant is predicated upon a failure of con-

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sideration, and the discount is only notice to the party, of the defence relied on. If the single bill could legally be regarded as given in consideration of the warranty of title and soundness, then it would be true, that there could be no failure of consideration, and the party's only remedy must be on the covenant of warranty. But the slaves sold are the consideration, and the unsoundness of them, or of some of them, makes either an entire or partial failure of consideration of the bill executed for their price. It was said in the argument, that the want of consideration could not be set up, against an instrument under seal. But this is not the rule. The sealing of an instrument is a legal implication of consideration; it dispenses with the proof on the part of the plaintiff. The onus of showing that it was without consideration is cast on the defendant. If he is able to make it appear, the defence is just as available to him against a single bill or bond, as it is against a note of hand or other parol contract.

The motion is dismissed.

JOHNSON, J., concurred.

Motion dismissed.

Walker vs. Briggs.

SARAH WALKER vs. THOMAS BRIGGS.

In case for malicious prosecution, the declaration described the finding of the grand jury to be, "No bill. S. Cannon, Foreman." The finding proved was "No bill. Richard S. Cannon, Foreman." Nonsuit for the variance refused.

Where an allegation is wholly immaterial a variance between it and the proof is no ground for a nonsuit.

BEFORE MARTIN, J., AT NEWBERRY, SPRING TERM, 1832.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

McCall, Davis, for appellant.

Caldwell, Fair, contra.

The opinion of the Court was delivered by

O'NEALL, J. The defendant's motion for a nonsuit has been rested in the argument, upon the ground of an alleged variance between the finding of the Grand Jury on the bill of indictment set out in the first count of the plaintiff's declaration, and that produced in evidence. The general rule is, that the allegation and proof must correspond, but like all other general rules, it is subject to exception, and therefore it is, if an allegation be wholly immaterial, it need not be proved. In 1 Chit. Pl. 261, it is said, "In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings; and all beyond is surplusage." At page 282, it is said, "If, however, the matter stated be wholly foreign and impertinent to the cause, so that no allega-

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tion whatever on the subject was necessary, it will be rejected as surplusage, and it need not be proved; nor will it vitiate, it being a maxim, that *utile per inutile non vitiatur*, except where, by the unnecessary allegation, the plaintiff shows that he has no cause of action. These are the rules under which the question, made in this case, must be tested. The declaration purports to set out the finding of the Grand Jury *in hæc verba*, and in doing so, describes it to be "No bill, S. Cannon, foreman." The finding offered in evidence is "No bill, Richard S. Cannon, foreman." Was it necessary to the plaintiff's cause of action, to set out the name of the foreman? It is clear that it is not; it is no part of the finding. It is the mere authentication by one of the jury, who is placed at their head, that such is their finding. But it need not be noticed; for the finding, is the finding of the whole jury, and not of the foreman. If it had not been signed at all, and had been received and entered in the minutes of the Court, it would have been just as good as when signed. If it was not necessary to be set out, does the mis-recital in the declaration prejudice the plaintiff? The answer to this question depends upon, whether it was wholly foreign and impertinent to the plaintiff's cause of action, so that no allegation whatever on the subject was necessary? and whether, if impertinent, it still shows, that the plaintiff has no cause of action? In malicious prosecution it is necessary that the plaintiff's declaration should contain a brief but certain narration of all the proceedings had, from the commencement to the termination of the prosecution. Every thing beyond this is foreign and impertinent to the cause. In narrating the history of the prosecution, the name of the foreman is as wholly foreign to it, as the name of the Judge, who presided at the Court, would be. Neither are necessary to be named, although we know that both are necessary to the administration of criminal justice. No allegation whatever on this subject was necessary to be made. The finding was sufficiently described by the words "no bill," and indeed, that was

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the whole finding of the Grand Jury. It cannot be pretended, that the mistake in the name of the foreman, showed that the plaintiff had no cause of action, for with or without it, the declaration sets out a good cause of action. I therefore conclude that the name of the foreman was surplusage ; may be struck out, and that a variance in the proof in that respect from the allegation, will not prejudice the plaintiff. The motion for a nonsuit must necessarily fail. The grounds for a new trial, are predicated altogether upon the facts, which were properly submitted to the jury, and with their verdict, this Court cannot interfere. The motion for a nonsuit or new trial is dismissed.

JOHNSON, J., and MARTIN, J., sitting for HARPER, J., concurred.

Motion dismissed.

Columbia, May, 1832.

JOSIAH N. BOGGS vs. F. W. SYMMES.

An *alias* must correspond with the original in the amount of damages laid.

An *alias* can only issue from the clerk's office of the district to which the original is returnable.

BEFORE EVANS, J., AT ANDERSON, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

“This was an action of slander for charging the plaintiff with stealing nails. The defendant in addition to the general issue pleaded the statute of limitations. The facts in relation to this plea were, the words were uttered in September, 1830. Both parties lived in Anderson. On the 18th February, 1831, the plaintiff lodged a writ in Pickens which was returned *non est inventus*. The writ was issued by J. E. Reese, plaintiff's attorney, and charged the defendant with uttering and publishing certain words to plaintiff's damage two thousand dollars. On the 9th Sept., 1831, another writ was issued (in Anderson District), which was called an *alias*, and served. This writ was signed by Burt and Reese, plaintiff's attorneys, and was for speaking, uttering, and publishing, certain false, scandalous, and malicious words to the plaintiff's damage five thousand dollars. This second writ, it was contended, was not a continuation of the first, being variant from it in several particulars. If it was a good continuation of the first writ, then the action was not barred, otherwise the action was barred, as more than six months had elapsed from the speaking of the words to the issuing of the last writ. I refused a motion for a new suit, and charged the jury that the action was not barred. I am by no means certain that I was right in so deciding, but thought it the better course, as the verdict settles the controversy between the parties if my decision was right, and if wrong, the con-

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troversy will be settled by the opinion of the Appeal Court reversing my decision."

The defendant appealed, and now moved this Court to set aside the verdict, and for a nonsuit or new trial, on account of the error or misdirection of the presiding Judge, as to the plea of the statute of limitations, the second writ not being a continuation of the first.

1. Because of the material variances between the two.
2. Because one was issued in Pickens District, the other in Anderson.

Whitner, Wardlaw, for appellant.

Burt, contra.

The opinion of the Court was delivered by

O'NEALL, J. The only question in the case is, whether the writ issued in Anderson District, and called an *alias*, was a good continuance of the original writ issued in and returned to Pickens District. That it was not, I entertain no doubt, on both of the grounds taken in the notice of appeal. Our original writ is in place of the *capias* of the English Courts. In 1 Sell. 71, after speaking of the *capias*, it is said, "if defendant can be served before the return thereof, sue out a *capias* by continuance, which is precisely the same as the first *capias*, only put in the præcipe the words *capias* by continuance, and also the date, when the first writ issued." In 2 Arch. Prac. 157, it is said, "care must be taken that the writ upon which the defendant is arrested, or ultimately brought before the Court, be of the same species with that originally sued out, and entered on the roll as above mentioned, and that the continuances correspond with both."

From these authorities it is plain that the original and *alias*, must correspond in all the essential parts. Both writs are

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sufficiently identical, in being for slander, and for words spoken. The description of the cause of action, if generally the same, would not by a slight change in the words used in describing it in the *alias*, render it no continuance of the original. Neither would the fact, that the *alias* was signed by other attorneys, than he who issued the original, be any objection to it. The damages laid in the original writ, are, however, an important and essential part of it, and in this particular the *alias* must correspond with it; for when we find the damages are laid in the two writs at different sums, the conclusion is inevitable that they are not for the same cause of action. This conclusion cannot be helped by anything out of the record.

That one is a continuance of the other must appear by comparison, and is to be judged of alone from the identity of both writs, in all the essentials. In this case the damages are laid in the original at two thousand dollars, and in the *alias* at five thousand dollars. This is a clear variance, and prevents the *alias* writ, as it is called, from being a continuance of the original.

An *alias* can only be issued from the clerk's office of the district to which the original is returnable. Before the *alias* is issued, the original must be returned; and being returned, the clerk then may seal the *alias*. No other clerk could seal the *alias* but he who was the clerk of the district to which the original was returned; for that is the warrant to issue the *alias*; and none but he, to whose office it belongs as a record, could have it before him, to authorize the issuing of the latter.

On both grounds, therefore, the writ called an *alias* was not a continuance of the original, and must itself be regarded as the commencement of the suit. The statute of limitations had run before it issued, and consequently the plaintiff was not entitled to recover.

The motion for a nonsuit is granted.

JOHNSON and HARPER, JJ., concurred.

Motion granted.

Wingo vs. McDowell.

O. W. WINGO vs. H. McDOWELL.

Sum. pro. on note to pay plaintiff "or order, five walnut bureaus having four drawers, to be done in workman order :"—*Held*, not to be a promissory note within the Statute of Ann—that plaintiff must aver, as well as prove, the consideration.

BEFORE EARLE, J., AT SPARTANBURG, SPRING TERM,
1832.

Sum. Pro. on an instrument as follows:—"By the first day of January next, I promise to pay Obadiah W. Wingo, or order, five walnut bureaus, having four drawers, to be done in workman order. February, 2d day, 1831.

"H. McDOWELL."

In the body of the process it was alleged, that the defendant is indebted to the plaintiff in the sum of eighty-five dollars, on a note, a copy of which is hereon endorsed; and a copy of the note was endorsed on the process.

Motion for a nonsuit, because the consideration should have been averred, was overruled. A decree was given for plaintiff, and defendant appealed.

Henry, for appellant.

Williams, Thomson, contra.

The opinion of the Court was delivered by

JOHNSON, J. The cases cited at the bar very clearly show that this contract is not a promissory note within the Statute of Ann; and that it was incumbent on the plaintiff to set out in his process and prove the consideration. *Peay vs. Pickett*, 1 Nott & McCord, 255; *Treadway vs. Nicks*, 8 McCord, 196;

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Douglas vs. Davis, 2 McCord, 218-9; *Jerome vs. Whitney*, 7 John. R. 321. The only allegation in this process is that defendant is indebted to plaintiff in the sum of eighty-five dollars on a note, a copy of which is hereon endorsed; that note is for the delivery of five walnut bureaux, without expressing any consideration, or even acknowledging any value received, so that whether we take the allegation in the body of the process, or in connexion with the copy of the note endorsed, as in the case of *Worthy vs. Gilchrist*, there is no averment of consideration, and according to the rule the process is bad. The summary process of the Court is *quasi* an equity proceeding, and on that account the Court has generally looked rather to the substance than form, as in the case last referred to; but no case has gone so far as to dispense with necessary and substantial averments: and I am not disposed to make a precedent so well calculated to surprise a defendant. I think, too, that the objection was properly taken on a motion for a nonsuit, or rather on demurring to the evidence. The defendant's indebtedness was charged in the body of the process, and the note endorsed was referred to for the manner; and permitting evidence of a consideration not expressed in the process or the note, was calculated to surprise the defendant, and ought not to have been allowed. We are, therefore, of opinion that the motion for a nonsuit ought to have been granted, and it is now so ordered.

This order renders it unnecessary to consider the other grounds of the motion; but I will passingly remark that the process is inartificial in another respect. It charges that the defendant is *indebted* to plaintiff. The cause of action proved is a breach of contract to deliver certain bureaux, and the plaintiff is entitled to recover damages for the breach, which is badly expressed by the term *indebted*, and as well might a plaintiff charge an indebtedness for a trespass or in case. The cause of action charged in the process is therefore foreign to that proved; and the application on the part of the plaintiff now to amend, even

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if the Court was authorized to allow it, comes too late after trial, as it would render an entire new process necessary.

O'NEALL, and HARPER, JJ., concurred.

Motion granted.

THE STATE vs. WILLIAM ALLEN.

A prisoner indicted for horse stealing, is entitled, since the Act of 1830, to the right of peremptory challenge.

It need not appear upon the face of the indictment whether it is for the first or a second offence.

BEFORE GANTT, J., AT LEXINGTON, SPRING TERM, 1832.

The prisoner was indicted for horse stealing, and claimed the right of peremptory challenge. As the indictment did not allege that it was for a second offence, his Honor held that the prisoner had not the right claimed. The verdict was guilty; and the prisoner appealed and now moved for a new trial.

Bauskett, Caughman, for appellant.

Elmore, Solicitor, contra.

The opinion of the Court was delivered by

O'NEALL, J. The prisoner was indicted at the last Court for Lexington District for horse stealing. On being put to the bar for his trial, he claimed the right of a peremptory challenge of the jurors as far as twenty. This claim was overruled

Columbia, May, 1832.

by the Court. He was tried and convicted, and now moves this Court for a new trial; first, on the ground that he was entitled to the peremptory challenge as claimed. At common law the prisoner was entitled, in all cases of felony, to a peremptory challenge, as far as thirty-five; by the Statute 22 H. 8, c. 14, § 61, Brev. Dig. 445, Tit. 106, § 8, this is reduced to twenty. The right of peremptory challenge, it is said, in 1 Chit. Cr. L. 535, is admitted only in favor of life; and *though it may be demanded even in clergyable felonies*, it can never be allowed to a defendant accused of a mere misdemeanor. By the Act of 1789, P. L. 486, horse stealing was declared to be a felony, without the benefit of clergy. The last Act (of 1830,) has merely mitigated the punishment; it substitutes whipping instead of death, for the first offence. The second offence is declared to be a felony, without the benefit of clergy. If whipping may be regarded as a substitute for branding in a clergyable felony, it is plain that the prisoner is entitled to the peremptory challenge. But if on conviction, under any circumstances, the prisoner would be liable to the judgment of death, the peremptory challenge must be allowed "in favor of life." In the indictment it is not necessary that it should appear, whether it is the first or second offence. *State vs. Smith*, decided at this term. If, upon a verdict of guilty, the solicitor is able to produce the record of a former conviction of the prisoner for horse stealing, he may move for sentence of death, which the Court would be bound to pass. It therefore follows, that for aught which appears to the Court from the indictment, the defendant may upon conviction be capitally punished: and in this respect the indictment is like an indictment for grand larceny, and the same analogy must exist in all the subsequent proceedings. In all clergyable felonies the prisoner may demand a peremptory challenge: it is granted to him for two reasons; first, because it was anciently supposed he might not have the benefit of clergy; second, because it might be that he might be ousted of his clergy by a former

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conviction. This last reason applies to the case before us, and is decisive of the prisoner's right to a peremptory challenge. Upon the other grounds of the prisoner's motion; the Court have formed no opinion; as the case must go back for another trial, it was thought best that he should be neither prejudiced nor benefitted by any view which this Court might have taken of the facts of the case. The motion for a new trial, is therefore granted on the first ground, and the prisoner remanded for trial at the next Circuit Court for Lexington District.

JOHNSON, J., concurred.

HARPER, J., absent.

Motion granted.

Columbia, May, 1822.

THOMAS SARTOR vs. B. McJUNKIN.

The sheriff's deed described the land with sufficient certainty by metes and bounds, but the entry of the levy was, as follows, "Levied on the defendant's land. May 9th, 1822:"—*Held*, that the entry of the levy was sufficiently certain.

The Court might order the entry, if there were error in it, to be amended, according to the truth and justice of the case.

The jury after they had agreed on their verdict, dispersed without permission of the Judge:—*Held*, that the Judge might in his discretion receive and record the verdict.

BEFORE EARLE, J., AT UNION, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

"This was an action of trespass to try titles. Both parties claimed under Major Joseph McJunkin, and it was admitted his title was perfect. The plaintiff claimed under a sheriff's sale, by virtue of sundry executions against Major Joseph McJunkin as his property, purchased by Thomas Craven and conveyed to John Anderson, and by John Anderson to plaintiff. The sheriff's deed to Craven is dated the 16th of March, 1824, for one thousand and ninety-three acres, recites the execution and describes the lands by metes and bounds which includes the same in dispute. The defendant claimed the land under a deed from Joseph McJunkin, Jr., to himself for one hundred and fifty acres, dated 16th October, 1824, and endeavored to establish a title in Joseph McJunkin, Jr., to the land in dispute, by a parol gift in 1809 or 1810, and actual and uninterrupted possession from that time forward. I have not the plat of re-survey before me, and shall find difficulty in making a satisfactory report. The land in dispute was fifty acres of the Landtrip Grant, which was for one hundred and fifty acres. It was conceded that the title of Joseph McJunkin, Jr., was good to

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one hundred acres of that tract under the gift and possession, and the question was whether his father, Major McJunkin, had given him the whole tract or only one hundred acres.— They were both sworn, and many other witnesses, the father insisting that he had given to his son the whole one hundred and fifty acres, and therefore, it did not belong to himself, and the son denying that he ever had any claim to it. The jury by their verdict decided against the title of Joseph McJunkin, Jr., and I thought correctly. If the land did not belong to him it formed part of the estate of Joseph McJunkin, Sen., and the questions raised are whether it was levied on and sold by the sheriff, and was there legal and competent evidence of such levy and sale? The original executions were all lost, and of course there was no proof of the actual levy as entered and returned on them. The sheriff's execution book was resorted to and the following entry read in evidence (made in several of the cases recited in the sheriff's deed): "Levied on the defendants land, May 9th, 1822," and other entries to the same effect of a later date but prior to the sale.

"Major McJunkin, at the time of the levy and sale, owned a large body of land, as appears from the deed, composed of two or three adjoining tracts of which the Landtrip tract was one. The fifty acres, or that part in dispute, lies between the one hundred acres, admitted to belong to defendant, under the deed of Joseph McJunkin, Jr., and the tract on which Major McJunkin lived. His house and the appurtenances are on the adjoining tract, but his plantation on which he resided at the time of the levy and sale, extends over upon the Landtrip tract and includes a considerable portion of the fifty acres.— The sheriff's deed, as already stated, describes the land sold by metes and bounds which embrace the land in dispute; and it was proved that Major McJunkin was present when the deed was drawn, and assisted in the description, and afterwards under some arrangement with the purchaser at sheriff's sale, by which he was permitted to sell the lands if he could, he

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offered for sale the fifty acres with the other lands. I thought it therefore sufficiently proved that the land in dispute was levied on and sold as the property of Major McJunkin.

"The jury, after the charge, had retired to their room and were in consultation when the Court withdrew without adjourning formally for dinner. I gave the jury no instructions on their retiring or when I left the court house. When I returned after an interval of an hour, I found the jury in their boxes ready to deliver their verdict. But it was objected by the defendant's attorney, that the jury after agreeing on their verdict had dispersed. On inquiry of the jury I learned, that after they had agreed and left their room, some of the jury were under the necessity of withdrawing; that they had accordingly dispersed for a short time but had returned as soon as they could. I had the jury twice polled: first, they were asked severally if they had agreed on the verdict before they left their room and dispersed: they all replied that they had. The verdict was then published and they were again severally asked if that was still their verdict, and they replied in the affirmative. I then ordered the verdict to be recorded. It was for the plaintiff."

The defendant appealed.

Irby, for appellant.

Thomson, contra.

The opinion of the Court was delivered by

JOHNSON, J. 'I do not understand that there is any want of certainty in the description of the land, in the deed made by the sheriff to the plaintiff; and the only question raised, as to the merits of the case, is whether the same degree of certainty was necessary to the entry of the levy, made in the sheriff's

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books. These entries are usually copied from the sheriff's return on the execution, and the object of them is to preserve a record of the manner in which the sheriff has discharged his duty; and whether the execution has or has not been satisfied; and these objects are as fully attained by concise memoranda containing a general description of the thing levied on, the price and person to whom sold, as if they contained the most formal recital of the defendant's title, and the precise distance and marks of the boundaries of the land; and such is the general usage. The deed is the evidence of the contract, between the sheriff and the purchaser, and it is enough if the lands are sufficiently described in that. If the sheriff take upon himself to sell lands or other property, not levied on, the sale would be void, and an inconsistency in the description of the land in the levy and the deed, might be evidence of that fact; but here, as I understand, the description in the levy is general, which is followed up by a particular description in the deed.— Thus one makes his bond to convey to another his lands in Black acre, and afterwards in pursuance of the bond, makes a deed in which the premises are described by metes and bounds: surely it would not be contended that the deed was void, because of the uncertainty of the description in the bond.

But there is a more conclusive view of this question. It is not pretended that the land in dispute was not the land actually levied on, advertised and sold, and if there was any error in the entry, the Court would even now order it to be amended, according to the truth and justice of the case. See *Sims vs. Campbell and Chambers*, 1 McC. Ch. 53.

The propriety of keeping a jury together until they have rendered in their verdict, cannot be too strongly inculcated; but the object is to obtain an unbiased expression of their judgment; and when, as in this case, it is obvious that their verdict was uninfluenced by any intervening cause, the Judge, in his discretion, was doubtless entitled to receive and record their verdict, although they had dispersed without his permission.—

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It is every day's practice, to allow the jury to disperse before they render their verdict, when it is necessary ; and I cannot perceive the great difference in principle between this and that case.

Motion dismissed.

HARPER, J., concurred.

O'NEALL, J., having been of counsel in the case, gave no opinion.

Motion dismissed.

State vs. Keenan.

THE STATE vs. STEPHEN KEENAN.

If upon the trial of an indictment for an assault and battery the prosecutor be examined, with a view to mitigate the sentence, upon matters immaterial to the issue, and swear falsely, it is perjury.

BEFORE EARLE, J., AT CHESTER, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows:

“The perjury was charged to have been committed on the trial of an indictment, at last Spring Term, before me, against Samuel Kilpatrick, for an assault and battery on the person of this defendant. He was the prosecutor and I believe the only witness. As the assault and battery was clearly proved, and I think not denied, the then defendant wished to show the provocation he had received with the view of mitigating the sentence, and was permitted to ask the prosecutor, (now defendant) on a cross-examination, it not being objected to by the Solicitor, whether he had not given the defendant, Kilpatrick, some grievous provocation the evening before the day on which the assault and battery was committed. The indictment sets out the oath as follows: ‘That the said Stephen Keenan did not give the said Samuel Kilpatrick any provocation a short time before the assault and battery charged in the said indictment, was committed, nor at any other time. And that the said Stephen Keenan did not stop at the bars, near the dwelling-house of the said Samuel, the evening before the said assault and battery was committed, and cry out: ‘hurra for the whore-shop.’ On this the perjury is assigned.

“A question was made by way of demurrer to the indictment, whether it could be sustained? whether the oath charged to be false, or rather the fact sworn to, was so far material to the issue then pending before the jury as that perjury could be

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assigned upon it? I was of opinion that the oath charged to be false, was in no way material to the issue, and therefore, that the indictment could not be sustained. The issue before the jury was guilty or not guilty of the assault and battery, charged in the indictment to have been committed on the person of the prosecutor (now defendant). What I understand by the word material in this connection, is that the fact sworn to, in order to enable perjury to be assigned upon it if false, must tend directly or indirectly to produce conviction on the mind to which it is addressed, upon the particular issue before it: and in the present instance that the fact sworn to should have a tendency to lead the jury to a conclusion that the person charged was guilty or not guilty of the assault and battery, either by its direct bearing on the issue, or by supporting or weakening the witness's testimony on some other point. And if the same verdict must have been rendered by the jury, whether the oath were true or false, it is obvious that it could not have been material. The very statement in the indictment seems to concede that the assault and battery was proved, and refers to some transaction anterior. Now if the defendant had committed the battery, and that was proved, the jury must have found him guilty, notwithstanding the previous provocation at another time. The question of *more or less guilty* is one for the Judge after conviction or proof of the offence at least; and evidence brought out on the trial directed to the Judge upon the latter issue, cannot be material to that pending before the jury, if it cannot vary their finding. I question the propriety of allowing testimony of that character to be given. Suppose on the trial, the defendant Kilpatrick had offered testimony of the provocation on the previous evening, such as is alleged to have been given, I apprehend the Court would have rejected it, if offered either as a justification or as contradicting the prosecutor. I therefore sustained the demurrer to the indictment, and the defendant had judgment."

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The State appealed on the grounds :

1. That the perjury charged was circumstantially material to the issue pending.

2. That the perjury charged was on a point material, as it was calculated to increase the punishment of defendant in case of conviction.

Pearson, Solicitor, for appellant.

Thompson, Williams, contra.

The opinion of the Court was delivered by

HARPER, J. We are of opinion that the motion must be granted, and the demurrer overruled. It is said by Sergeant Hawkins, Ch., 69, § 3, "Also it seemeth that any false oath is punishable as perjury, which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause." It is necessary that the falsehood alleged, should be material to an enquiry in the course of a judicial proceeding, though not relating strictly to the principal issue. Certainly the inquiry into the extent of the defendant's guilt, as indicated by the circumstances of mitigation or aggravation, was properly an inquiry in the course of a judicial proceeding. It is not necessary, in deciding the present question, to impugn the decision in the case of *Smith & Cameron* ads. *The State*, 2 Bay. 62. Supposing that the testimony would, if objected to, have been rejected as irrelevant, yet by waiving the objection, the parties consent to make not only the question of guilty or not guilty, but also of the extent and character of the guilt. If, after a verdict of guilty, the witness had been sworn *ore tenus* to testify to the circumstances, for the information of the Court in passing sentence, there could be no doubt but that

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perjury would be assignable upon a false oath on such an inquiry. I do not perceive how it can make a difference that the same inquiry is instituted on the principal trial. It is to no purpose to say that the witness is only sworn to testify the truth on the issue. In a civil action for trespass, and not guilty pleaded, the issue is in strictness only guilty or not guilty; yet the jury inquire into the amount of damages, and unquestionably perjury is assignable on a false oath upon such an inquiry. Upon an indictment, the Court instead of the jury inquires into the extent of the penalty incurred. The witness in such case, cannot be unaware of the materiality of the inquiry, and it would be giving encouragement to perjury, that its penalties could be evaded by such a pretext. I am authorized by my brethren, who have been more conversant with the practice than myself (and so far as my own observation has gone, it agrees with theirs) to say that it has been a long established and general practice to inquire into the circumstances of mitigation or aggravation, on the principal trial. If there be no objection at least, the inquiry is properly so made. Certainly there are some advantages in this practice. The circumstances of aggravation or extenuation, are often the most material part of the case, and these can be much better understood by the *viva voce* examination, and cross-examination of witnesses, than by affidavits.

The motion is granted.

JOHNSON and O'NEALL, JJ., concurred.

Motion granted.

State vs. Smith.

THE STATE vs. J. SMITH.

The indictment need not state whether it is for the first or a second offence, although the crime be punishable for the first offence with whipping, and for the second with death without the benefit of clergy.

New trial because the Circuit Judge refused to continue the case, on account of the absence of a witness in Georgia, refused.

A prisoner indicted for horse stealing is not entitled to traverse.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Eaves, Caughman, for appellants.

Pearson, solicitor, contra.

The opinion of the Court was delivered by

JOHNSON, J. The prisoner was indicted under the Act of 1830, for the crime of horse stealing, and was convicted upon very conclusive proof of his guilt. The Act punishes the first offence with whipping, and the second with death, without the benefit of clergy; and it is now moved in arrest of judgment on the ground, as explained in the argument, that the indictment does not state whether this is the first or second offence. There is no precedent that has fallen within my observation of an indictment charging a former conviction for a similar offence, notwithstanding the many instances in which the benefit of clergy is allowed in the first and taken away in the second offence. The practice is doubtless founded on the principle, that the record of the first conviction is conclusive evidence of the first

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offence, and evidence cannot be admitted to contradict it. Phil. Ev. 219. It would be useless to aver in an indictment a fact which was ascertained of record, and which the accused was incapable of contradicting. In addition to this, whether it be the first or second offence, the accused has incurred a guilt to which the law has affixed a punishment, and whether in a greater or less degree, can only be judged of by the record; these are proved by inspection, and judged of by the Court, not the jury. It is only necessary to decide upon the existence or non-existence of the record, when the Court is called on to pronounce the sentence of the law. If there be but one conviction, then, of course, the law imposes only the punishment for the first offence. If there be two convictions, then the punishment for the second offence follows, and for this purpose it is certainly immaterial whether the first conviction is or is not recited in the record of the second, and this is in conformity with the practice here and every where else.

The prisoner also moves for a new trial on the grounds: 1. That the trial of the cause ought to have been postponed on the cause shown on Circuit. 2. That he was entitled to traverse the indictment as of right. On the subject of continuance for cause shown, it will be sufficient for the general rule, to refer to what is said by the Court in the case of *Doherty vs. Littlefield*. The only cause shown here, having the least plausibility, was the absence of a witness residing in Georgia, whose attendance no efforts had been made to procure. I remember one instance in which the late Mr. Justice Nott ordered a prosecution to be stayed, unless the prosecuting officer would consent to take the examination of a witness who resided out of the State, by commission, on his being fully satisfied that his evidence was material to the defence of the accused; and upon a clear case made, I am disposed to think that precedent deserves to be followed. But here the Judge proceeded upon the belief that this was a mere shift of the prisoner to delay the trial, and the circumstances I fear too well justify it.

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Judge Blackstone remarks, that it is usual to try felons immediately, or soon after their arraignment; but that it is not customary, nor agreeable to the general course of proceeding, unless by consent of parties, or when the defendant is actually in jail, to try persons indicted of sma'ller misdemeanors at the same court at which they have pleaded not guilty, or traversed the indiotment; (4 Black. Com. 351); and our practice has been in conformity to this rule: and in the application of it, the accused has been denied the right of traverse in all cases of larceny and other crimes where the punishment is infamous; and this case falls clearly within this class of offences.

We are, therefore, of opinion, that the motions both in arrest of judgment and for a new trial ought to be dismissed, and it is accordingly so ordered.

O'NEALL and HARPER, JJ., concurred.

Motion refused.

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ANN GUPHILL vs. HENRY ISBELL.

A secret resulting trust arising from the fact that the negro was paid for with the defendant's money, cannot avail as a defence to an action of trover brought by the party having the legal title—where the possession was never surrendered to the *cestui que trust*.

An executor who had the possession may maintain trover in his own right, without styling himself executor.

BEFORE EARLE, J., AT FAIRFIELD, SPRING TERM, 1832.

The report of his Honor, the presiding Judge, is as follows :

“ This was an action of trover for four negroes, Betty and her three children. The case has heretofore been before the Court of Appeals, and all the questions of law which I supposed could arise on the facts proved, were then settled. The case made before me was the same as that formerly made, except that the ground relied on by the defendant was weakened by new evidence on the part of the plaintiff in reply. He produced a copy of the returns made by George Slappy, as the administrator of George Snider, showing the actual value of the estate, and that it was impossible that the negro Betty could have been purchased wholly with the funds of the defendant's wife, or that any considerable portion of them could have been so used by William Guphill. It will be sufficient for the purposes of this report, to refer to the opinion formerly delivered, as containing a correct summary of the facts proved before me, with the exception already mentioned. I believe the only additional fact proved on the part of the defendant was, that in 1818 or 1819, David Foster, who had married Mrs. Snider, and she, were appointed the guardians of Mrs. Isbell. Foster died in February, 1819, and Mrs. Foster, towards the end of that year, went to live with Mr. Guphill. She either then returned the negro Betty at the time of her own removal there,

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or had done so before. On this point there was conflicting testimony. It was fully proved, however, that the negro was in the possession of Guphill several years before his death, which occurred in November, 1821; and she and her children were then in possession of the plaintiff until December, 1825.

"Various and contradictory declarations were proved to have been made at different times by the different parties, concerning the title to the negroes, on the effect of which the Court has already given its opinion, that they were not inconsistent with the plaintiff's right to recover at law, on the supposition that there was a trust.

"The defendant offered to prove some declaration made by the plaintiff in the lifetime of her husband. On an objection being made, the counsel was asked to state to what effect, and the answer was a declaration by the plaintiff in her husband's lifetime, that the negroes did not belong to them, but to Mrs. Foster. I overruled the testimony as incompetent or irrelevant. If the possession of the plaintiff since the death of her husband, under his will, be adverse to the right of Mrs. Foster, she would be entitled to recover; and if she was in possession as bailee of Mrs. Foster, she would still be entitled to recover against the defendant, a wrong doer.

"The defendant's counsel relied on the fact, that Foster and his wife were guardians of defendant's wife in 1818 or 1819, and therefore there might have been a surrender of the trust to them. If the negro had been delivered to them after the appointment, there would be ground for argument; but the negro had been in possession of Mrs. Snider for seven or eight years. And the jury could not presume a surrender, even if the guardian had been competent to accept or to make the election, which I by no means admit, from the mere fact that the negro remained in their possession as she had been before.

"I charged the jury on the whole case in exact conformity to the principles laid down by the Court in their opinion setting aside the former verdict. I did not think the case made now

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varied in any important particular from that made before, except that new evidence on the part of the plaintiff in reply went to show that the negro was purchased with the funds of Mrs. Snider (Foster), if not with those of Guphill himself. The plaintiff had a verdict for the negroes and hire."

The defendant appealed, and moved for a new trial, on the following grounds:

1. Because the Court rejected the evidence of a witness by the name of John Ford, who was called on the part of the defendant to prove the declaration of the plaintiff respecting the right of the negroes in dispute.

2. Because the Court charged the jury, that inasmuch as defendant's wife was a minor, there was no person legally authorised to accept from William Guphill the trust that had been reposed in him, although it was expressly proved that David Foster, the step-father of defendant's wife, and her mother, became her guardians in the year 1817 or 1818.

3. Because the Court charged the jury, that plaintiff was in possession of the negroes more than four years, between the death of her husband, William Guphill, and their going into possession of defendant, and that she was entitled to them by the statute of limitations, unless they were trust property; although it was proved that Mrs. Guphill, plaintiff, in the year 1822, acknowledged the negroes to be the property of defendant's wife.

4. Because, if the negro girl Betty was purchased with the funds of Harriet Snider, the mother of defendant's wife, as intimated by the Court to the jury, she and her increase became the property of David Foster on his intermarriage with the said Harriet Snider, and the right of them after his death vested in his representative Dixsey Ward, and he alone, or his bailee, could support an action for them against defendant.

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5. Because, if the negro Betty and children were really the property of defendant's wife, as was clearly proved, the negroes being in the possession of defendant, he had a right to defend his title to them at law; although the property might originally have been trust property.

6. Because the Court charged the jury, that plaintiff could recover against defendant on the proof of possession, although the defendant set up a title to the negroes in himself and wife.

Clarke, for appellant.

Gregg, contra.

The opinion of the Court was delivered by

O'NEALL, J. The presiding Judge reports, that the case proved on this trial is the same as that formerly made, except that the ground relied on by the defendant was weakened by new evidence in reply. This is decisive of the questions now made, and which are embraced in the former opinion. But with a view of satisfying the learned counsel for the motion, that he has not been precluded from availing himself of a defence at law, which was *there possible* to have been made, I have looked into the notes of the evidence, and if any trust at all was proved, it is clearly not more than a resulting trust, from the investment of the funds of the defendant's wife in the purchase of the negro woman Betty. Such a trust cannot be set up at law; it is a mere equity, which the *cestui que trust* may, in equity, set up, and have decreed; or claim on account of the fund invested, at her election. It is true, it is said by some of the witnesses, that Guphill said he bought the negro for the defendant's wife; and if that stood alone, and the *cestui que trust* had the possession, I should be inclined to say, that it would be a good legal defence to an action of trover, at the

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suit of the trustee; for in that case the *cestui que trust* would have the right of possession; and that must defeat an action of trover. But notwithstanding these declarations, it appears that the plaintiff's testator took the title to the negro in his own name, without any declaration of the trust. This vested the legal estate and right of possession in him, and at law this cannot be defeated by a secret trust which results from the purchase being made with the funds or for the use of another. The whole evidence, therefore, which went to set up this secret, or resulting trust, was inadmissible at law, as contradicting a plain legal estate created by deed. *Redwood vs. Reddick*, 4 Mun. 222.

It has been contended on this occasion, that the bequest to the plaintiff for life, could not convey to her the trust estate which her testator had in the slaves. The bequest to her is general, of "the use of all my slaves and all their future increase during her life." This would not pass to her slaves which were held by him as a plain and direct trust for the use of another; for it would not be intended that the testator intended to give by a general bequest, that in which he had nothing but the legal right of property, while the right of possession was in another. But it may well be doubted, whether property in which a resulting trust might or might not be set up at the election of the *cestui que trust* would not pass, subject to the equity, under such a general bequest. In this case however the inquiry is unimportant. The plaintiff is the only qualified executrix of her husband's will; in that character the trust devolved upon her; she had the actual possession of the property, which went either tortiously or accidentally into the possession of the defendant. Upon her possession she could maintain trover without styling herself executrix; and before the defendant could have forced her to rely upon her right of property as executrix of William Guphill, he must have made out a *prima facie* case of a legal right of possession. This he

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failed to do; for his rights (if he has any) are entirely equitable and not legal.

The motion for a new trial is dismissed.

HARPER and JOHNSON, JJ., concurred.

Motion dismissed.

BENJ. MARKLEY ET AL., vs. CHARLES AMOS.

An attorney-at law has authority to submit his client's cause to arbitration by rule of Court, but in no other way.

BEFORE EARLE, J., AT SPARTANBURG, SPRING TERM,
1832.

This was an action of trespass to try title. S. Bobo had been the attorney at law of the plaintiffs, and, by agreement, had submitted the matter to arbitration. The defendant pleaded the award, which was in his favor, as a defence to the action.

His Honor, the presiding Judge, charged that the agreement to submit to arbitration was not binding on the plaintiffs. The defendant appealed.

Thomson, Williams, for appellants.

Irby, Bobo, contra.

The opinion of the Court was delivered by

HARPER, J. The question argued in this case is, whether an attorney at law entrusted to prosecute a suit, can bind his client by submission to arbitration, otherwise than by rule of

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court? The general rule is clear, that no person can bind another without authority; and if he have authority for one purpose, he cannot bind him for another, beyond the scope of his authority. The authority of an attorney at law does not authorise him to compromise the claim of his client, as is laid down in *Holker vs. Parker*, 7 Cranch, 436, quoted by the appellant's counsel in this case. The authority to prosecute a suit at law seems to have 'no relation to the submitting of the suit to arbitration. The argument mainly relied on was this: the authority to submit by rule of Court is clear; (the various cases to this effect were referred to, in some of which it seems the submission of the attorney has been held to bind the client even against his consent;) in either case, the submission rests merely on the agreement; and no reason can be conceived why the agreement should bind after the cause is brought into Court, rather than before the suit is instituted. I should hold it a sufficient answer to this reasoning to say, that the general principle is against this power of the attorney. The authority to submit by rule of Court is an exception to general principles, and I am not disposed to carry the exception farther than adjudged cases will warrant. That many cases establish the attorney's authority to submit by rule of Court affords room for inference, that he cannot submit in any other way. I can conceive sufficient reason for this distinction. There is less room for misconduct and collusion by the attorney, when the submission is in open Court, and the proceeding is subject to the control of the Court, than when it is by the mere private act of the attorney. Kyd, in his treatise on awards, says, referring to 1 Salk. 70, and 1 Ld. Raym. 246: "If an attorney, without the express authority of his principal, enter into a bond to a third person, under a condition to be void on performance of the award by the principal, otherwise to be in full force, this shall bind the attorney, and not the principal. Yet it is the common understanding, that the assent of an attorney in a cause, to a reference by a rule at *nisi prius*, will

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bind the principal ; and the reason of the difference seems to be this,—that in the first case, the general character of attorney does not imply a commission from the principal to do any thing so much out of the ordinary course of a general attorney, as to refer a matter to arbitration ; but the employment as an attorney in a particular suit, implies his client's assent that he may do everything which the Court may approve in the progress of the cause." Apart from the power to conduct the suit, and to do what the Court may approve in the conduct of it, it seems more foreign to the authority of an attorney at law, than a general attorney, to submit a cause to arbitration. The motion is dismissed.

JOHNSON and O'NEALL, JJ., concurred.

Motion dismissed.

D. McCASKILL vs. JOHN F. BALLARD.

In an action by the holder against the drawer of a negotiable note, the defendant, before he can be let into the defence of failure of consideration, must show, either that the plaintiff is not a holder for valuable consideration, or that the note was negotiated after it became due, or that the plaintiff purchased it with knowledge of the failure of consideration.

This was an appeal from the decision of the Circuit Court for Sumter, at Spring Term, 1832.

Moses, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. If a negotiable note or bill is negotiated before it is due, for a valuable consideration, and without notice of the want or failure of consideration, the holder is

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entitled to recover against the maker or drawer, unless it be void in its creation. Possession of such a paper is *prima facie* evidence that it was acquired for a valuable consideration before it was due, and without notice of the want or failure of consideration. 3 Kent, 51; 2 Stark on Ev. 251. In *Collins vs. Martin*, 1 B. & P. 651, Ch. J. EYRE said, "But no evidence of want of consideration or other ground to impeach the apparent value received, was ever admitted between such an acceptor or drawer and the third person holding the bill for value. And the rule is so strict that *it will be presumed that he does hold for value until the contrary appears. The onus probandi lies on the defendant.*" In 2 Stark on Ev. 292, it is said, "The defendant, by proof that the bill was indorsed after it became due, places the plaintiff in the situation of the indorser, and may give any evidence in bar of the plaintiff's claim which would have defeated that of the indorser." In 3 Kent, 52, it is said, "As between the original parties to negotiable paper, the provisions in favor of the *bona fide* assignee do not apply, and the consideration of a note, bill or check may be inquired into; it may be inquired into between the maker and payee, indorser and indorsee, for the latter are in this view treated as original parties. The rule equally applies, when *the indorsee took the paper with notice* of the illegal consideration, or of the want of it, or of any circumstances which would have avoided the note in the hands of the indorser; or when not taken in the course of mercantile business; or after it was due." These authorities fully sustain the general positions, which I have already stated; for although it is not said in words, that notice to the holder before he acquires possession of the note or bill, of the want of consideration between the original parties, must be proved by the defendant before the defence can be gone into; yet it is clear that the rule is so; for no one is bound to prove a negative, and that would be the effect of the rule requiring the plaintiff to prove that he acquired the note or bill without any notice of the want or

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failure of consideration between the original parties. The defendant in this case before he could be let into the defence of a failure of consideration, was bound, therefore, to show, either that the plaintiff *was not a holder for valuable consideration*, or that the *note was negotiated after it became due*, or that *the plaintiff purchased it with a knowledge of the failure of consideration*. In the case of *Lightner vs. Martin*, 2 McC. 214, it was held that the declarations, or admissions of the payee of a note, could not be given in evidence, in an action between the holder and maker; but I think the rule is too broadly stated in that case. If at the time the declaration or admission, relied on as evidence, is made, the payee is in the possession of the note, I should think it would be evidence; for he is then the owner, and may legally discharge or defeat it, and his interest would prevent a false admission or statement. After he has parted with the note, he has no right to discharge or defeat it, and any declaration which he might then make, would have no security from interest that it should be true. In such a case I should hold, as was held in the case of *Lightner vs. Martin*, that his declaration or admission would be inadmissible. The motion for a new trial is granted on the two first grounds.

JOHNSON and HARPER, JJ., concurred.

Motion granted.

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ADMINISTRATOR.

1. When the surety of an administrator conceives himself in danger of being injured by his suretyship, he is entitled, under the Act of 1839, section 19, (11 Stat. 43,) to be relieved from future liability on his own motion and without proof of any danger. *McKay vs. Donald*..... 331

Vide Magistrate's Executions.

ADVERSE POSSESSION.

1. Against a mere trespasser without title or possession, plaintiff's possession will be held to have extended to the limits of his color of title. *Evans vs. Corley*..... 315

Vide Trespass to try Title, 1, 2.

AGENCY.

Vide Bonds, 1. Evidence, 5,

AGENT.

Vide Railroads, 7, 8, 9.

ALIAS.

Vide Practice, 2, 3.

AMENDMENT.

Vide Sheriff, 6.

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APPEAL.

1. The Circuit Court of Equity ordered an issue at law, and "that either party be at liberty to prosecute an appeal to the Law Court of Appeals:"—*Held* that the appeal in such cases should be to the court ordering the issue: the Law Court of Appeals refused to hear it. *Mayrant & Moses vs. Miller*..... 284
Vide Railroads, 5. Wills, 1.

ARBITRATION.

1. An attorney at law has authority to submit his client's cause to arbitration by rule of Court, but in no other way. *Markley vs. Amos*..... 468

ARREST.

Vide Bail.

ASSAULT AND BATTERY.

1. In an action for assault and battery no evidence implicating one of the defendants was given by the plaintiff, but the defendants in their cross-examination of a witness proved that all the defendants had been indicted and convicted for the same offence:—*Held*, that this was sufficient evidence to authorize a verdict against all the defendants. *Wolff vs. Cohen*... 144
2. That the defendants had been punished *criminaliter* for the same offence, cannot be shown in mitigation of damages in the civil action. *Id.*

ASSIGNMENT.

Vide Discount. Partnership, 1, 2.

ATTACHMENT FOR CONTEMPT.

Vide Replevin, 8.

ATTORNEY AT LAW.

Vide Arbitration.

BAIL.

1. In an action on a bail bond, an arrest of the principal, by the sheriff, under *ca. sa.*, may be shown by parol. *McKnight vs. Sessions*..... 210
2. The arrest of the principal under *ca. sa.*, discharges the bail; and a subsequent discharge of the principal with his consent under the Act of 1815, does not revive the liability of the bail..... *Ib.*

Vide *Criminal Law*, 4.

BAILMENT.

Vide *Railroads*, 7, 8, 9,

BENEFIT OF CLERGY.

Vide *Criminal Law*, 18, 14, 24.

BILL OF PARTICULARS.

Vide *Variance*.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. On a note past due, the payee, in the spring of 1827, made the following endorsement: "I endorse the within note for value received, on condition the holder first tries the within N.; if the money cannot be had before Christmas, then I hold myself responsible for the money to the holder." N. was sued by the holder and judgment recovered against him at Fall Term, 1827. *Et fa.* was issued and returned *nulla bona*. In an action against the endorser, *held*, that it was not necessary to show that a *ca. sa.* had been issued, and that the holder had failed to make the money under it. *Arnold vs. Waters*..... 438
2. Under such a contract it is not necessary to prove the insolvency of the maker..... *Ib.*
3. Sum. pro. on note to pay plaintiff "or order, five walnut bureaus having four drawers, to be done in workman order:"—*Held* not to be a promissory note within the Statute of Ann—that plaintiff must aver, as well as prove the consideration. *Wingo vs. McDowell*..... 446

4. In an action by the holder against the drawer of a negotiable note, the defendant, before he can be let into the defence of failure of consideration, must show, either that the plaintiff is not a holder for valuable consideration, or that the note was negotiated after it became due, or that the plaintiff purchased it with knowledge of the failure of consideration. *McCaskill vs. Ballard*. 470

Vide *Evidence*, 1.

BONDS.

1. Though a surety may by parol authorize his principal to fill up blanks in the bond, with the date and the name of the obligee, yet before the blanks are filled up and the bond delivered he may revoke the authority, and it makes no difference whether the obligee, in whose name the blank is afterwards filled up, knew when he took the bond that the authority was revoked or not. *Gourdin vs. Read*..... 230
2. In debt on bond, a verdict for defendant on the ground that the bond had not been accepted by the obligee, set aside as without evidence to sustain it. *Hagood vs. Harley*..... 325
3. An instrument cannot be an escrow if delivered to the party himself—the delivery must be to a stranger..... *Id.*

Vide *Injunction*.

BURNING HOUSE IN NIGHT TIME.

Vide *Criminal Law*, 18.

CA. SA.

Vide *Bail*.

CHALLENGE.

Vide *Criminal Law*, 21.

CITY COURT OF CHARLESTON.

1. Defendant lived over four months in the summer with his father-in-law in the city of Charleston. In the winter following he removed to his plantation, and while there he was sued in the City Court—the writ being served by copy left at the house of his father-in-law. In the May after, he returned to the city, and again spent the summer with his father-in-law:—*Held*, that defendant was a resident within the meaning of the Act of 1818, and subject to the jurisdiction of the City Court. *Cohen vs. Wigfall*..... 237

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CLERGY, BENEFIT OF.

Vide Criminal Law, 13, 14, 24.

CLERK.

Vide Docket.

COLOR OF TITLE.

Vide Adverse Possession.

COMMISSIONER IN EQUITY.

Vide Injunction.

COMMISSION TO EXAMINE WITNESSES.

Vide Costs, 1.

COMMISSIONS.

Vide Factor's Accounts.

COMMON CARRIERS.

Vide Railroads, 7, 8.

CONFESSION OF JUDGMENT.

1. A judgment may be confessed though no suit be, in fact, pending.
Keep vs. Leckie.. 164
2. A confession is valid though the judgment is not to be entered up except upon the happening of a contingency..... *Id.*
3. The judgment was confessed during vacation. After the next term the contingency happened upon which plaintiff was to have the right to enter it up. Shortly after the happening of the contingency the defendant died, and then the plaintiff entered up the judgment:—*Held*, that the proceedings were regular and the judgment valid, notwithstanding the 10th Rule of Court, and the death of the defendant..... *Id.*

CONSPIRACY.

Vide Criminal Law, 9, 10, 11, 12.

CONTRACTS.

1. Defendants, co-partners and factors, doing business in Charleston, employed plaintiff, and contracted to give him all their draying. Defendants afterwards dissolved their partnership, and the new firm, employed another drayman:—*Held*, that the contract terminated with the partnership, and that the new firm did not employ the plaintiff was no breach of it.—*Holmes vs. Caldwell*... 247
2. Plaintiff conveyed to defendant a tract of land as containing one hundred and ten acres, at eight dollars per acre; and it was verbally agreed between them, that the land should be surveyed, and if it turned out to contain less than one hundred and ten acres plaintiff should refund, and if it contained more, defendant should pay for all over one hundred and ten acres at the rate of eight dollars per acre;—*Held*, that the agreement was not within the fourth section of the statute of frauds; and that plaintiff's promise was a sufficient consideration to support defendant's. *Garret vs. Malone*..... 835
3. A contract, if defendant would hire from plaintiff two negroes as boat hands, plaintiff would deliver to them his cotton crop to be carried to market, is not *nudum pactum*: it is promise for promise. *Rice vs. Sims & Worthy*..... 416
4. A discount predicated of the breach of this contract, pleaded to an action for the hire of the negroes, is not barred if filed within four years after demand of performance..... *Ib.*
Vide Bills of Exchange and Promissory Notes, 1, 2, 8. Master and Slave.

CONSIDERATION.

Vide Bills of Exchange and Promissory Notes, 8. Contracts, 2, 8. Failure of Consideration.

CONSTABLE.

Vide Evidence, 5. Magistrate's Execution.

CONTINUANCE.

Vide Practice, 1, 6.

CO-PARTNERSHIP.

Vide Partnership.

CORPORATIONS.

Vide *Taxes*.

COSTS.

1. Assumpsit for breach of contract. No special damages laid in the declaration. Plaintiff issued a commission to establish special damage:—*Held*, that inasmuch as the evidence was irrelevant, the costs and expense of the commission should not be taxed for the plaintiff against the defendant. *Teague vs. Railroad Company* 154
2. An order at March term, 1852, required the plaintiff to enter security for costs, on or before the ensuing term, or be nonsuited. Default was made, the cause was continued, and at March term, 1854, a motion was made for leave to enter security *nunc pro tunc*:—*Held*, that the original order was imperative, and the plaintiff out of court. *Burke vs. Dillingham*..... 256
3. The continuance of the cause on the docket, and defendant's omission to enter up judgment of nonsuit, did not amount to a waiver of his rights under the order..... *Id.*

CRIMINAL LAW.

1. A bench warrant was ordered to be issued on the charge of forgery. The warrant stated the charge to be fraud. The recognizance stated the charge to be fraud or forgery: it bore date a day or two after the commencement of the term, and required the defendant to appear on the first Monday, &c., being the first day of the term:—*Held*, that the recognizance was valid. *State vs. Rowe & Vaughn*..... 17
2. A warrant to arrest need not set out the offence..... *Id.*
3. It is no objection to a recognizance, that there is a variance between it and the warrant to arrest..... *Id.*
4. The bail will not be discharged although the principal be required to answer, in the alternative, to a charge of fraud or forgery..... *Id.*
5. A recognizance to answer to a charge of felony requires the personal appearance of the defendant..... *Id.*
6. Notwithstanding the Act of 1845, (11 Stat. 341,) forgery is still a felony, under the Act of 1801, (5 Stat. 397)..... *Id.*

7. Where a civil action by the owner, and a prosecution instituted by a third person, are both pending for the same offence of harboring a slave, the owner may, nevertheless, be required to elect on which case to proceed. *State vs. Arnold*..... 89
8. When either case is ready for trial the defendant may require the election to be made..... *Ib.*
9. Indictment for a conspiracy to pervert legal process to the unlawful purpose of extorting a deed from J. M., charging that defendants executed their purpose by the concerted means. Verdict—guilty, which the Court of Appeals refused to disturb. *State vs. Shooter*, 72
10. The deed, which was extorted, was a conveyance of land from J. M. to L. G., one of the defendants. Evidence, in behalf of defendants, to show that the paper title to the land was already in L. G., was excluded on circuit, and on appeal *held*, that, under the circumstances, it was properly excluded..... *Ib.*
11. Indictment for a conspiracy to extort a deed by means of a peace warrant:—*Held*, that the offence of conspiracy might be made out, although the affidavit to obtain the peace warrant was true. *Ib.*
12. The conspiracy may be criminal, although the purpose be merely to get possession of land by means of an extorted deed in favour of the legal owner..... *Ib.*
13. One convicted under Statute 22 & 23 Car. II. c. 7, of burning a house in the night time, is entitled to his clergy. *State vs. Bosses*, 276
14. When a new felony is created by statute, clergy is incident thereto unless expressly taken away..... *Ib.*
15. Where an English statute, made of force in this State, contains a provision that the felon may elect to be transported, it will be enforced as if there were no such provision it..... *Ib.*
16. In cases of misdemeanor defendant is not entitled to have his witnesses bound over. *State vs. Thomas*..... 296
17. Where judgment is arrested a new indictment may be given out on the same warrant..... *Ib.*
18. A prosecution for trading with a slave is not barred as to the imprisonment after six months..... *Ib.*

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19. An indictment charging, generally, that defendant "unlawfully did sell and retail spirituous liquors, that is to say, in quantities less than three gallons, he then and there not having any license or permit," &c., without specification of any person to whom the sale was made, or of any other identifying circumstance, is bad.
State vs. Steedman..... 812

20. The defendant, with three others, was convicted of an affray for beating in public one M. During the affray the prosecutrix went up to protect M., who was her son, and defendant struck her:—*Held*, that the conviction for the affray was no bar to this indictment for an assault and battery on the prosecutrix. *State vs. Parish*..... 822

21. A prisoner indicted for horse stealing, is entitled, since the Act of 1830, to the right of peremptory challenge. *State vs. Allen*..... 448

22. It need not appear upon the face of the indictment whether it is for the first or a second offence..... *Id.*

23. If upon the trial of an indictment for an assault and battery the prosecutor be examined, with a view to mitigate the sentence, upon matters immaterial to the issue, and swear falsely, it is perjury. *State vs. Keenan*..... 456

24. The indictment need not state whether it is for the first or a second offence, although the crime be punishable for the first offence with whipping, and for the second with death without the benefit of clergy. *State vs. Smith*..... 460

25. A prisoner indicted for horse stealing is not entitled to traverse.... *Id.*

DAMAGES.

Vide *Evidence*, 7. *New Trial*, 4, 5. *Railroads*, 5, 6.

DEED.

1. A deed of conveyance described the land as containing so many acres, "being part of a tract of eleven thousand seven hundred and thirty acres granted to W. M.: situate," &c.; "bounded," &c.; "as will more fully appear by reference to the annexed plat."—*Held*, that the conveyance embraced all the land described by the plat, although a portion of it was outside of the grant to W. M. *Evans vs. Corley*..... 815

Vide *Evidence*, 6. *Presumptions*. *Sheriff*, 5.

INDEX.

DESCRIPTION.

Vide Deed.

DISCOUNT.

1. After assignment under the Act, for the benefit of creditors, a debtor of the assignor, who was also his surety, paid the debt for which he was surety:—*Held*, that he could not set up the payment as a discount to the action by the assignor to recover, for his assignees, the debt due by the defendant. *Nettles vs. Huggins*,... 273
- Vide Contracts*, 4. *Failure of Consideration*, 1. *Limitations, Statute of*, 1, 2, 8.

DISTRESS.

Vide Landlord and Tenant, 1, 3, 4. *Replevin*, 1, 2.

DOCKET.

1. It is the duty of the clerk to enter causes on the issue-docket in the order in which the issues are made up—the first issue made up should be the first entered. *McBride vs. Ellis*..... 226
2. Where the issues are made up at the same time, the directions of the plaintiff's attorney, as to the order in which the cases should be docketed, should be regarded by the clerk; and in default of all directions the discretion of the clerk must, in such cases, determine the order..... *Id.*

Vide Evidence, 7.

DOWER.

Vide Wills, 7, 8.

EASEMENT.

Vide Ways.

ELECTION.

Vide Criminal Law, 7, 8.

ESCROW.

Vide Bonds, 8.

ESTOPPEL.

1. *Sci. fa.* by administrator of plaintiff to revive a judgment founded on a note. Defence, that before judgment recovered, plaintiff had assigned the note to the wife of the defendant and the heirs of her body—the assignment to take effect after the death of the donor:—*Held*, that defendant was estopped by the judgment from making the defence. *Koon vs. Ivey*..... 87
2. Defendant was sued as executor. He pleaded *non assumpsit* and the statute of limitations; and at the trial contended, that as he was not rightful executor, but executor *de son tort*, plaintiff was not entitled to nine months, in addition to the four years allowed by the statute of limitations, within which to sue:—*Held*, that defendant was estopped by his pleading from contending that he was not the rightful executor. *Railroad Company vs. Joyce*..... 117

EVIDENCE.

1. Defendant gave plaintiff his note for eighty dollars “for the hire of his boy Tom.” In an action of *assumpsit* for employing Tom in a way contrary to the agreement, whereby his death was caused, *held*, that it was admissible for the plaintiff to show the terms of the contract of hiring by parol. *Knight vs. Knott*..... 85
2. Where it is competent to give a conversation in evidence, the testimony of a by-stander who overheard it, is not secondary evidence. It is not necessary to call a witness who was engaged in the conversation. *Peeples vs. Smith*..... 90
3. Plaintiffs in Baltimore consigned certain goods to defendants in Charleston, who were auctioneers, and who sold the goods. The action was for the proceeds of sale. Defence, that plaintiffs had a lien on the goods by reason of advances made to one B., who had possession of one of the bills of lading, and who claimed the goods:—*Held*, that the defendants could not read in evidence a letter received by them from B. which enclosed the bill of lading. *Graff & Co. vs. Caldwell*... 129
4. That defendants could defend themselves by showing that plaintiffs had sold the goods to B., but that B.’s possession of one of the three usual bills of lading was not of itself sufficient evidence that he owned the goods..... 13.
5. B. was plaintiff’s agent to collect her rents. She issued her distress warrant to defendant, a constable, to distrain for rent due her. After the goods were distrained, B. directed all further proceedings to be stayed. In an action against the constable for returning the goods and not selling them, *held*, that it was competent for him to show by parol B.’s agency, and that he had directed the proceedings to be stayed. *State vs. Kennedy*..... 206

6. In trespass *quare clausum fregit*, the testimony of the sheriff that he did not levy on the land in dispute, will not be received to contradict the terms of his own deed and the entry of his levy. *Sawyer vs. Leard*..... 268
7. In cases on the inquiry docket, the cause of action being admitted, and the only question being as to the amount of damages, full proof as in other cases is not required. *Walters & Walker vs. McGirt, Meekins & Son*..... 287
8. Plaintiff was the payee of a note drawn by defendant, which a third person had got possession of fraudulently and transferred to W. Notice was given to defendant not to pay the note to W., but he did pay it to him, and this action was brought for the amount of the note :—*Held*, that W. was an incompetent witness for defendant, he being liable to defendant in case of plaintiff's recovery. *Proctor vs. McCall*..... 425
- Vide *Assault and Battery. Bail, 1. Bills of Exchange and Promissory Notes, 4. Insolvency. Presumptions. Practice, 2. Wills, 6, 7.*

EXECUTION.

Vide *Lands. Magistrate's Execution. Partnership, 8. Resulting Trust, 1.*

EXECUTORS AND ADMINISTRATORS.

Vide *Administrator. Executor de son tort. Trever. Wills.*

EXECUTOR DE SON TORT.

1. Paying the debts of a deceased with one's own money, does not make one executor *de son tort*. *Carter vs. Robbins*..... 29

FACTOR'S ACCOUNTS.

1. Interest is chargeable on factor's accounts for advances or purchases. *Walters & Walker vs. McGirt, Meekins & Son*..... 287
2. A charge for commissions on the balance, of a factor's account sued for, will not be allowed..... *Id.*

FAILURE OF CONSIDERATION.

1. A defence of unsoundness, to a note given for the purchase-money of negroes, proceeds on the ground, not of discount, but of failure of consideration. *Mallock vs. Gibson*..... 427

2. In an action on a sealed instrument defendant may show that it was
without consideration, or that the consideration had failed..... *Id.*
Vide Bills of Exchange and Promissory Notes, 4. Limitations, Statute of, 1.
Vendor and Vendee.

FELONY.

Vide Criminal Law, 5, 6, 14, 15, 21, 24.

FI. FA.

Vide Lands. Resulting Trust, 1.

FINE.

Vide Mayor of Charleston.

FORGERY.

Vide Criminal Law, 1, 4, 6.

FORWARDING AGENT.

Vide Railroads, 7, 8, 9.

FRAUDS, STATUTE OF.

Vide Contracts, 2. Lands, 1, 3, 4.

HARBORING SLAVE.

Vide Criminal Law, 7, 8.

HORSE STEALING.

Vide Criminal Law, 21, 25.

HOUSE.

Vide Criminal Law, 18.

HUSBAND AND WIFE.

1. L. W. advanced to T. M. four thousand dollars, to be used in buying and selling negroes, and agreed to settle one-half of the nett profits to the sole and separate use of the wife of T. M. There were executions against T. M. at the time, and he was insolvent. T. M. purchased negroes, and after the death of L. W. settled with his administratrix. Some two or three weeks after the settlement, the administratrix executed a deed, by which she conveyed some of the negroes which had been purchased by T. M., and which had remained in his possession ever since, to a trustee for the sole and separate use of his, T. M.'s, wife, the same being intended to represent one-half of the nett profits of the traffic:—*Held*, that the transaction was valid against the execution and other creditors of T. M. *Hodges vs. Cobb*,.... 50
2. An insolvent husband may stipulate beforehand, that the proceeds of his labor shall be appropriated to the sole and separate use of his wife, and such stipulation is no fraud on his creditors..... *Id.*
3. The donor conveyed a negro girl to a trustee "for the support of H. C., the daughter of my wife, for the term of twenty-one years, then, at the expiration of that term, to be vested in H. C.," absolutely. H. C. afterwards married and died before the twenty-one years had expired:—*Held*, that the marital rights of her husband had not attached on the property. *Taylor vs. Wilson*... 285

IMPRISONMENT.

Vide *Criminal Law*, 18.

INDICTMENT.

Vide *Criminal Law*, 19.

INFANT.

1. An infant beyond seas is entitled to but four years *after coming of age* within which to commence an action of trover. *Papot vs. Trowell*, 284

INJUNCTION.

1. When an action is brought upon an injunction bond, the law court may look into the proceedings in equity which led to the giving of the bond, in order to determine its validity. *Norris vs. Cobb*, 58

2. The commissioner may grant a special injunction requiring security for the forthcoming of property, which is the subject of a bill in equity..... *Ib.*
3. An order by the commissioner, that "a special writ of injunction do issue," is too general, and void..... *Ib.*
4. Such a general order may be cured by the writ, if that state the matter specially; but then the writ must be a judicial act, and be signed by the commissioner himself..... *Ib.*
5. The commissioner has no authority to grant a special injunction requiring the defendant to give security, that he "will not waste the estate of his testator, now in his hands as executor, and will fully account for the same."..... *Ib.*
6. Failure to pay a mere money decree cannot be a breach of any bond which a commissioner may rightfully take under a special injunction..... *Ib.*
7. A special injunction ordering security for the forthcoming of property in litigation, is within the powers of the Court of Equity, and may be granted by a master or commissioner, under the 8th section of the Act of 1840. *Aldrick vs. Kirkland*,..... 349
8. But an injunction to compel a party to find sureties to perform any other decree, such as the payment of money, is contrary to the rules and practice of the Court..... *Ib.*
9. An injunction bond, conditioned that if the defendant shall cause certain property (specifying it) "to be forthcoming, to be subject to the final order of the Court," &c., and "shall abide by and perform such orders and decrees as the said Court shall make in the said cause," &c., construed, *ut res magis valeat quam pereat*, to require the defendant to abide by and perform such orders and decrees as the Court shall make, touching the property specified, which was to be forthcoming, &c.; and not to require the performance of any decree which the Court might make..... *Ib.*
10. Failure to perform a mere money decree, *held* to be no breach of the bond. *Ib.*

INQUIRY DOCKET.

Vide Evidence, 7.

INNKEEPER.

1. An innkeeper may not detain the goods of a boarder for the price of his board, though he may those of a traveller. *Ewart vs. Stark*, 423

INSOLVENCY.

1. Insolvency may be established by other evidence than a *ca. sa.* under which the debtor was discharged. A return of *nulla bona*, and general reputation of insolvency, is, in general, sufficient *prima facie* evidence of it. *Arnold vs. Waters*..... 433
Vide Bills of Exchange and Promissory Notes, 2. *Sheriff*, 4.

INTEREST.

1. A party may claim interest from a time anterior to the accrual of the cause of action. *Rice vs. Sims & Worthy*..... 416
Vide Factor's Accounts, 1.

ISSUE AT LAW.

Vide Appeal.

JUDGE.

1. In charging a jury the judge may give them his opinion upon a question of fact. *Verdier vs. Verdier*..... 135

JUDGMENT.

Vide Confession of Judgment. Estoppel, 1.

JURISDICTION.

Vide City Court of Charleston.

JURY.

Vide Practice, 5.

JUSTIFICATION.

Vide Magistrate's Execution.

LANDS.

1. K. purchased land, paid part of the purchase money, and gave his note for the balance, with C. as surety. The conveyance was made to C., who, on the same day, signed a paper promising that, when relieved from his liability as surety, he would make such conveyance of the land as K. should direct. K. afterwards paid the note, and, by his direction, C. thereupon executed a second paper, declaring that he held the land as trustee for the sole and separate use of the wife of K., for life, and after her death to the use of K. for life, and after the death of the survivor, to the use of the children of K.:—*Held*, that K. had, neither before nor after the second paper was executed, such present interest in the land, during the lifetime of his wife, as could be levied on and sold by the sheriff under a *fi. fa.* *White vs. Kavanagh* 877
2. Doubted whether the sheriff could levy on and sell K.'s future interest in the land under the second paper..... *Id.*
3. Under a *fi. fa.*, a sheriff can levy on and sell land only where the debtor has a legal estate, or such a trust as is contemplated by the 10th section of the statute of frauds..... *Id.*
4. The 10th section of the statute of frauds contemplates only a case where the trust is a clear and simple one for the benefit of the debtor..... *Id.*

LANDLORD AND TENANT.

1. One tenant in common, who has leased to his co-tenant, may distrain for the rent. *Luther vs. Arnold*..... 24
2. One occupying and paying rent under an agreement in writing for the renewal of a lease for three or more years, is a tenant from year to year, and not a tenant according to the terms of the agreement to renew. *Huger vs. Dibble*..... 222
3. A lessee, who has parted with the whole term, cannot distrain on his sub-lessee. *Ragsdale vs. Estis*..... 429

LEGACY.

1. Testator bequeathed to his two daughters, E. and J., one thousand dollars to each, "to be paid in either money or negroes at their value," and to his son, W., two thousand dollars—"negroes Lewis, Jane, Buck, Daniel, Bob and Prime, to be divided, according to valuation, between E., J. and W., to answer to the amount above bequeathed:—*Held*, that the legacies were pecuniary and not specific. *Bell vs. Hughes*..... 397

2. In cases of doubt, Courts incline against construing legacies as specific..... *Ib.*

LESSEE.

Vide Landlord and Tenant, 4.

LEVY.

Vide Evidence, 6. Lands. Magistrate's Execution. Resulting Trust, 4.

LIMITATION OF ESTATES.

1. Testator bequeathed certain slaves to his grandson, J. R., "for and during the term of his natural life, and, after his death, to the heirs of his body lawfully begotten, or to such person or persons as he, by will, after he comes of age, shall devise and bequeath them to: But if my said grandson shall die before having lawful issue, or before making a legal disposition by will of the said negroes, then, and in either of such cases, the said negroes and their increase shall return and become part of my estate, and be equally divided amongst my heirs, agreeably to the statute of distributions of force in this State:"—*Held*, that J. R. took an absolute estate defeasible upon the happening of the contingencies mentioned; and he having died of full age, before having lawful issue, and intestate, his interest was determined. *Marshall & Fair vs. Rives*..... 85
2. Testator bequeathed "to N. L., and the lawful heirs of his body, one negro girl: the said N. L. dying without lawful heirs of his body, the said girl and her increase shall be returned and equally divided between my son W. L. and my daughter M. N.:"—*Held*, that the limitation to W. L. and M. N. was void for remoteness. *Lyon & Norwood vs. Walker*..... 807

LIMITATIONS, STATUTE OF.

1. To an action of debt on bond given for the price of a tract of land, a defence of partial failure of consideration, because of a deficiency in quantity, is not subject to the plea of the statute of limitations. *Evans vs. Yongue*..... 118
2. The statute of limitations ought not to be formally pleaded to a notice of discount. It may be objected *ore tenus* on the trial. *Rice vs. Sims & Worthy*..... 416

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3. If formally pleaded, it, with the replication, may be treated as surplusage, and will not injure either party..... *Id.*
4. A plea of *non assumpsit infra*, &c., to an executory contract, is bad... *Id.*
Vide Contracts, 4. *Criminal Law*, 18. *Infant. Trespass to try Title*, 2.

MAGISTRATE'S EXECUTION.

1. A. B. was sued as administrator before a magistrate, upon a debt of his intestate. Judgment was recovered. The execution was issued against A. B. in his individual capacity, styling him "administrator of A. Y.:"—*Held*, that the execution was null and void, and not merely irregular; and, therefore, did not justify a levy and sale by the constable of A. B.'s property.
Beasley vs. Dunn..... 345

MALICIOUS PROSECUTION.

Vide Variance, 2.

MARITAL RIGHTS.

Vide Husband and Wife, 8.

MASTER AND SLAVE.

1. One, who received a fifty dollar bill from the plaintiff's slave, and detained it, supposing it to be stolen, *held* bound, after advertising the bill and waiting over three years, to pay it to the plaintiff, no better owner appearing. *Peay vs. McEwen*..... 81
Vide Criminal Law, 7, 8. *Railroads*, 1, 2, 8.

MAYOR OF CHARLESTON.

1. The Mayor of the City of Charleston holding a Police Court may lawfully impose a fine upon one who had violated a city ordinance, as the alternative of his prosecution; and if the party choose to pay it he cannot afterwards recover it back. *Smith vs. Hutchinson*, 260

MISDEMEANOR.

Vide Criminal Law, 16.

NEGLIGENCE.

Vide Railroads, 1, 2, 8.

NEW TRIAL.

1. Though the Circuit judge improperly admitted evidence of the good character of the plaintiffs, a new trial was refused, because the evidence could have had no effect on the verdict. *Peoples vs. Smith*, 90
 2. After the jury had been fully instructed, the circuit judge was asked to give further instructions upon questions of fact, which he declined to do. New trial refused, *Id.*
 3. Because the judge in charging the jury confounded the names of some of the witnesses, *held* to be no ground for a new trial. *Verdier vs. Verdier*, 135
 4. New trial on the ground of excessive damages, refused. *Wolf vs. Cohen*, 144
 5. The damages found by the Jury depending upon the facts, the Court would not interfere. *Rice vs. Sims and Worthy*, 416
 6. New trial, because the Circuit Judge refused to continue the case on account of the absence of a witness in Georgia, refused. *State vs. Smith*, 460
- Vide *Bonds*, 2. *Prison Bounds Act*, 1. *Railroads*, 1. *Trespass to try Title*, 1.

NONSUIT.

Vide *Variances*. *Ways*.

PARTNERSHIP.

1. An assignment by one partner of his interest to his separate creditor is valid at law, against the creditors of the firm subsequently attaching. *Wilson & Co. vs. Bowden*, 9
 2. An assignment by one partner of his interest in the books of the firm is valid, at law, against the creditors of the firm. *Norris vs. Vernon & Poole*, 13
- Two judgments and *fi. fa's* of the same date were entered—one against A. B. alone, and the other against A. B. and C. D., late co-partners. The sheriff levied on and sold land, and other property of A. B.—*Held*, that the money should be applied to the execution against A. B. alone. *Roberts vs. Roberts*, 15

PERJURY.

Vide *Criminal Law*, 23.

PLEADING.

Vide *Bills of Exchange and Promissory Notes*, 3. *Trover*.

PRACTICE.

1. A Judge is not bound to order a continuance on the affidavit and other requisites required by the 23d Rule. It is a matter within his discretion. *State vs. Thomas*,..... 295
 2. The Court may permit evidence to be given after argument commenced,..... *Ib.*
 3. An *alias* must correspond with the original in the amount of damages laid. *Boggs vs. Symmes*,..... 448
 4. An *alias* can only issue from the clerk's office of the district to which the original is returnable..... *Ib.*
 5. The jury after they had agreed on their verdict, dispersed without permission of the Judge:—*Held*, that the Judge might in his discretion receive and record the verdict. *Sartor vs. McJunkin*, 451
- Vide *Bail. Confession of Judgment. Costs. Docket. New Trial. Summary Process. Variance. Wills*, 1, 2.

PRESUMPTIONS.

1. A deed will not be presumed, *juris et de jure*, without proof of twenty years' possession. *Stockdale vs. Lee*,..... 401
2. Facts showing the existence, loss and contents of a deed may authorise the presumption without the proof of possession..... *Ib.*
3. In the absence of such proof, a long possession, but short of twenty years, accompanied by possession of the grant and other muniments of title, may create a presumption of the deed..... *Ib.*

PRISON BOUNDS' ACT.

1. The commissioner of special bail had allowed the applicant for the prison bounds' Act to amend his schedule, but at the trial he failed to explain the matter, and the effect of the amendment, to the jury: New trial for this reason granted—the verdict being against the applicant. *Wiley, Banks & Co. vs. Smith*,..... 339
2. The commissioner was examined as a witness, and while testifying was stopped by one of the counsel and testified no further:—*Held*, that this was improper,..... *Ib.*

PROMISSORY NOTES

Vide Bills of Exchange and Promissory Notes.

RAILROADS.

1. Case against a railroad company for running over and killing with their train a slave of the plaintiff's, asleep upon the road. Verdict for the defendants, which on appeal the court refused to disturb. *Richardson vs. Railroad Company*,..... 120
2. Even if there was negligence on the part of the defendants, the slave, whose act is to be attributed to the owner, being as much to blame as the defendants, no recovery could be had,..... *Ib.*
3. The proximate cause of the slave's death being his own voluntary imprudence, the defendants are not liable,..... *Ib.*
4. The charter of a railroad company authorized them to construct their road "from Charleston," &c.:—*Held*, that the company had no authority to enter the city, but that the boundary of the city was the *terminus a quo*. *Railroad Company vs. Payne*,..... 177
5. On an appeal by the N. E. R. R. Company from the assessment by commissioners of damages sustained by a land-owner in consequence of the location of the road through his land, the jury are not limited to the amount fixed by the commissioners, but may give higher damages. *Railroad Company vs. Sineath*,..... 185
6. Damages cannot be assessed by the jury for fencing along the road through unenclosed land used for grazing,..... *Ib.*
7. For the plaintiffs, doing business in Columbia, goods were shipped from New York to Charleston to the care of the So. Ca. Railroad Company, whose course of business it was to receive and forward goods so addressed:—*Held*, that the company were not liable as common carriers until the goods were received by them for carriage. *Maybin and Van Wirt vs. Railroad Company*,..... 241
8. That considering them as forwarding agents, the rule as to their liability was not the same as that which applied to them as common carriers,..... *Ib.*
9. Considering them as forwarding agents they would be liable for refusing to receive, unless they showed good excuse for not receiving; and, after receiving, they would be liable for not taking all the care which a prudent man would about his own business,..... *Ib.*

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RECOGNIZANCE.

Vide *Criminal Law*, 1, 8, 5.

RENT.

Vide *Landlord and Tenant*.

REPLEVIN.

1. Plaintiff, in replevin, must allege, that the goods distrained are his own, or that they were taken from his possession. *Luther vs. Arnold*,..... 24
2. The action of replevin is, in this State, confined to cases of wrongful distress. *Hewiston vs. Hunt*,..... 106
3. Plaintiff had issued a writ of replevin against the sheriff, for wrongfully taking her goods, under an execution against a third person. The circuit judge quashed the writ, and on appeal his decision was sustained:—*Held*, that the sheriff could not be attached for a contempt, for proceeding to sell the goods under the execution, pending the appeal,..... *Id.*

RESIDENCE.

Vide *City Court of Charleston*.

RESULTING TRUST.

1. A resulting trust is not the subject of levy and sale by the sheriff under a *fi. fa.* *White vs. Kavanagh*,..... 378
2. A secret resulting trust arising from the fact that the negro was paid for with the defendant's money, cannot avail as a defence to an action of trover brought by the party having the legal title—where the possession was never surrendered to the *cestui que trust*. *Guphill vs. Isbell*,..... 463

RESULTING USE.

1. A use can result only to the party who makes the conveyance—not to a third person. *White vs. Kavanagh*,..... 378

RETAILING.

Vide *Criminal Law*, 19.

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REVOCATION.

Vide Wills, 2, 5.

RIVERS.

Vide Water courses.

SEALED INSTRUMENT.

Vide Failure of Consideration, 2.

SECURITY FOR COSTS.

Vide Costs, 2, 8.

SET-OFF.

Vide Discount.

SHERIFF.

1. The Sheriff failing to return tax executions within the time limited by law, his sureties cannot show in their defence to an action brought on his bond, the insolvency of the defendants in the executions, inasmuch as the Act of the Legislature makes him liable for the amount of the executions for not returning the same within the time allowed. *Treasurers vs. Hilliard*, 412
2. The sheriff's sureties cannot show in their defence that the State was indebted to the sheriff. *Id.*
3. The sheriff's sureties are not liable for the *penalties* imposed by Acts of the Legislature for not returning executions, and not paying over within ten days after demand. *Id.*
4. In a suit against the sureties for not returning executions in civil cases, it being a mere question as to the amount of damages sustained by plaintiffs, evidence of the insolvency of the defendants in execution may be given. *Id.*
5. The sheriff's deed described the land with sufficient certainty by metes and bounds, but the entry of the levy was, as follows, "Levied on the defendant's land. May 9th, 1822:"—*Held*, that the entry of the levy was sufficiently certain. *Sartor vs. Mc Junkin*, 451

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6. The Court might order the entry, if there were error in it, to be amended, according to the truth and justice of the case,..... *Ib.*

Vide Evidence, 6. Lands. Replevin, 8. Resulting Trust, 1,

SLAVE.

Vide Criminal Law, 7, 18. Master and Slave. Railroads, 1, 2, 3.

SPECIAL INJUNCTION.

Vide Injunction.

SPECIAL VERDICT.

1. Special verdict and *venire facias de novo* awarded by the Court of Appeals—the verdict finding no fact from which a legal conclusion as to the guilt of the defendant could be deduced. *City Council vs. Gadsden*,..... 180

SUB-LESSEE.

Vide Landlord and Tenant.

SUMMARY PROCESS.

1. Defendant in *sum. pro.* being served with interrogatories to answer “whether he had purchased the goods charged in the account sued on, on credit, and at the prices charged;” answered that he had, but that he had paid the account;—*Held*, that plaintiff was entitled to a decree—defendant’s answer as to the payment not being evidence for him. *Walker vs. Berry*,..... 33
2. Plaintiff in *sum. pro.*, whether he have common law evidence to prove his demand or not, may, in order to prove it, require the defendant to answer interrogatories, and upon his failure to do so take a decree *pro confesso*. *Brown vs. Stroud*,..... 292

SURETY.

Vide Administrator. Bonds, 1. Sheriff, 1, 2, 3, 4.

TAXES.

1. The town council of Mount Pleasant have power, under their charter of 1845, to make assessments and levy taxes on the inhabitants, &c., and enforce payment "to the same extent, and in the same manner, as is provided by law for the collection and payment of the general State tax:"—*Held*, that the authority of the town council was subject to the provision of the Act of 1788, that one believing his property overrated in the assessment, may swear off the excess. *State vs. Town Council*..... 214

TAX EXECUTION.

Vide Sheriff, 1.

TENANT FROM YEAR TO YEAR.

Vide Landlord and Tenant, 2.

TENANT IN COMMON.

Vide Landlord and Tenant, 1.

TRADING WITH SLAVE.

Vide Criminal Law, 18.

TRANSPORTATION.

Vide Criminal Law, 15.

TRAVERSE.

Vide Criminal Law, 25.

TRESPASS TO TRY TITLE.

1. New trial granted in an action of trespass to try title, the jury having found for the plaintiff, who claimed by adverse possession, against the weight of the evidence. *Abel vs. Hutto*..... 42
2. A party claiming title to land by adverse possession, must show *clearly*, not only that his possession was adverse, but that it was for the full statutory period. If there be doubt on either of these points, the possessory claim must yield to the legal title..... *Id.*

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8. A very small trespass, such as cutting off a cotton-wood tree, is sufficient to sustain the action of trespass to try title. *Spigener vs. Cooner* 801

TROVER.

1. An executor who had the possession may maintain trover in his own right, without styling himself executor. *Guphill vs. Isbell*..... 463
Vide *Infant. Resulting Trust*, 2.

TRUSTS.

Vide *Lands. Resulting Trusts*.

UNSOUNDNESS.

Vide *Failure of Consideration*, 1.

USE.

Vide *Resulting Use*.

VARIANCE.

1. Variance between the proof and the bill of particulars no ground for nonsuit. The objection should be to the evidence when offered. *Gregg vs. Vause*..... 431
2. In case for malicious prosecution, the declaration described the finding of the grand jury to be, "No bill. S. Cannon, Foreman." The finding proved was "No bill. Richard S. Cannon, Foreman." Nonsuit for the variance refused. *Walker vs. Briggs*. 440
3. Where an allegation is wholly immaterial a variance between it and the proof is no ground for a nonsuit..... *Id.*

VENDOR AND VENDEE.

1. Action by the administrator of the vendor upon notes given for the purchase-money. No conveyance of the land had been executed, but the vendor had given bond to make titles, and the defendant was in possession. Defendant claimed an abatement because there was title paramount in a third person to part of the land. A survey, without notice to the vendor, from copy-deeds from the register's office, the declarations of the vendor, and proof of claim made by a third person, held to be *prima facie* evidence of paramount title, entitling the defendant to go to the jury upon the question of abatement. *Benson vs. Coleman*..... 45
Vide *Contracts*, 2.

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VERDICT.

Vide Practice, 5. Special verdict.

VOLUNTARY PAYMENT.

Vide Mayor of Charleston.

WARRANT.

Vide Criminal Law, 2, 3.

WATER COURSES.

1. Where a river changes its bed gradually and imperceptibly by washings from one bank and accretions to the other, the proprietor whose bank is increased is entitled to the addition.
Spigener vs. Cooner..... 301
2. But where a river changes its course from a known cause, as by freshets, one or more, or by a cut through which a new channel is formed, the proprietor's right to go to the centre of the old bed, if it can be ascertained, is not destroyed..... *Ib.*

WAYS.

1. Right of way claimed by necessity. The evidence showed that though the way was a great convenience to the plaintiff, there was no actual necessity for it, as he had another way:—Non-suit ordered on circuit, which the Court of Appeals refused to set aside. *Screven vs. Gregorie*..... 158

WILLS.

1. An appeal from the ordinary upon a question of admitting a will to probate, must be tried *de novo*, and the appellants may take grounds not taken before the ordinary. *Peeples vs. Smith*.... 90
2. Where the objection to the probate of a will is, that it has been revoked by writing, the jury, in finding a verdict establishing of the will, may also find "against the revocation."..... *Ib.*
3. Of the three subscribing witnesses to a will, near thirty years old, two were dead and their signatures were proved. The surviving witness recognized his signature, but had no recollection of the transaction:—*Held*, that the will was sufficiently proved. *Verdier vs. Verdier*..... 135

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4. A testator, when executing his will, need not make formal publication of it, nor even declare the nature of the instrument..... *Id.*
5. A great change in the pecuniary circumstances of the testator, and some change in his social relations and moral duties, *held* not to amount to an implied revocation of the will..... *Id.*
6. Where executors, who are also legatees, propound a will for probate, their declarations, as well after as before the execution of the will, may be given in evidence by the next of kin. *Peeples vs. Stevens*..... 198
7. Parol evidence is inadmissible to show that a provision in the will for the widow was intended to be in lieu and bar of dower. *Hall vs. Hall*..... 407
8. Testator bequeathed to his wife certain articles of personalty, and "all the rest of the property she brought when I married her;" and he directed that "the rest of my property, real and personal, be sold and equally divided between my four children:"—*Held*, that the provision for the wife was not in lieu of dower... *Id.*

Vide Legacy. Limitation of Estates.

WITNESS.

Vide Criminal Law, 16. Evidence, 2, 8. Wills, 8.

WRIT.

Vide Practice, 2, 8.

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